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No. 03-

IN THE

# Supreme Court of the United States

WANDA M. BRYANT,

*Petitioner*,

*v.*

AIKEN REGIONAL MEDICAL CENTERS, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the traditional deference afforded to a jury's factual findings applies to a jury's decision to award punitive damages?

2. Whether the good-faith defense to punitive damages established by this Court in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), is available where liability is based on the acts of an upper-level, managerial employee who was the same individual responsible for compliance with the employer's anti-discrimination policies?

3. Whether the "make whole" purpose of Title VII requires a district court to consider the negative income tax consequences of a plaintiff's receiving multiple years of back pay as a lump-sum in a single tax year?

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Petitioner, Wanda M. Bryant (hereinafter "Ms. Bryant"), hereby prays that this Court issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered June 27, 2003.

## OPINIONS BELOW

The opinion of the court of appeals, which is set forth in Appendix A, at 1a-20a, is reported at 333 F.3d 536. The order of the court of appeals denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is set forth in Appendix C, at 39a-40a. The district court's post-trial order of June 5, 2002, which is set forth in Appendix B, at 21a-38a, is not officially reported.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 27, 2003. The court of appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on July 22, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Re-Examination Clause of the Seventh Amendment to the United States Constitution provides, "no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const., amend. VII.

The relevant portions of Title VII of the Civil Rights Act of 1964, as amended, provide as follows: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to

hire . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ." 42 U.S.C. § 2000e-2(a)(1). In addition, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a).

The relevant portions of 42 U.S.C. § 1981 provide as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . . For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. §§ 1981(a) & (b).

The relevant portion of 42 U.S.C. § 1981a provides as follows: "A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

## STATEMENT OF THE CASE

This is a race discrimination and retaliation case arising out of Respondent's refusal to promote Petitioner on two separate occasions: first to the position of surgical technician and later to the position of registered nurse. Petitioner's complaint includes claims under both Title VII and section 1981.

Ms. Bryant was a certified, Army-trained surgical technician,[1] when she went to work for Respondent, Aiken Regional Medical Centers, Inc. (hereinafter "ARMC" or "the hospital"), as a central services technician[2] in April 1994. She accepted the lower-skilled, lower-paying position in central services because she was informed that no full-time surgical tech positions were open at the time, and she hoped to move into a surgical tech position as soon as an opening occurred. She also started nursing school under a scholarship program through ARMC, whereby she agreed to work for the hospital, after graduation, as a nurse for 1½ years for every two semesters of tuition benefits she received.

After the full-time surgical tech positions became available in the fall of 1997, Ms. Bryant applied for promotion on several occasions in late 1997 and early 1998, but did not receive a job offer. Eventually, in April 1998, she complained to the hospital's Services Excellence Coordinator, who was an employee in

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[1] A surgical technician, also known as an operating room ("OR") tech or scrub tech, is a trained medical professional who assists physicians with surgical procedures. Ms. Bryant actually received her surgical tech certificate in *1988*, not 1998 as set forth in the opinion of the court of appeals, App. A, at 2a.

[2] A central services technician is generally responsible for sterilizing surgical equipment and assembling trays of equipment for various surgical procedures.

ARMC's Human Resources Department, that she believed she was being discriminated against based on her race. Thereafter, ARMC again refused to hire her as a surgical tech, despite having continued difficulty filling the position. Ultimately, the hospital created an in-house training program to address the surgical tech shortage. When the initial surgical tech training class consisted entirely of white employees, Ms. Bryant again complained to her supervisors about suspected race discrimination.

Approximately three months later, in December 1998, as Ms. Bryant's graduation from nursing school approached, she began to apply for nursing positions that were posted within the hospital. The staffing shortage that had plagued the hospital with respect to the surgical tech positions was even worse for nursing positions. Nonetheless, despite the nursing shortage and despite her exclusive commitment to the hospital under the nursing scholarship, she received no response to her applications. She eventually sought assistance from ARMC's Human Resources Director and the Chief Nursing Executive, both of whom failed to provide any meaningful assistance to her. Finally, after Ms. Bryant had received the runaround for approximately two months, the Human Resources Director informed her that the scholarship agreement was not binding on her because no one from the hospital had actually signed the paperwork. Accordingly, he told her that she was free to seek a nursing job elsewhere, without having to reimburse the hospital for the scholarship money. At approximately the same time, she received an unsolicited letter of recommendation from her immediate supervisor, praising her outstanding work history in central services. Ms. Bryant believed that the hospital was "showing her the door" because of her race and because of her prior complaints about race discrimination.

The case was tried to a jury in Aiken, South Carolina, on March 18-20, 2002. The jury returned a verdict in favor of Ms. Bryant on March 20, 2002, on three of the four claims submitted to it in special interrogatories on the verdict form. The jury awarded her $40,000.00 in back pay and benefits, $50,000.00 in compensatory damages for emotional distress, and $210,000.00 in punitive damages. The district court treated the jury's verdict on back pay as an advisory verdict, and, after independent consideration, the court adopted it as the equitable award of back pay.

Prior to entry of judgment, the district court requested the parties to brief the appropriateness of the jury's award of punitive damages. The district court conducted a thorough review of the punitive damages award and concluded that the award was reasonable, appropriate, and fully supported by the evidence. In addition, the court confirmed that its jury instructions were consistent with the standards announced in *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535, 545 (1999). Although the district court acknowledged that the hospital had adopted a written anti-discrimination policy, the court determined that

> [t]he evidence is . . . more than sufficient to support the conclusion that any written policy was not implemented in good faith and that the discriminatory and retaliatory actions directed towards [Ms. Bryant] were sufficiently widespread among multiple persons with managerial and administrative responsibilities to treat those acts as the intentional actions of the employer.

App. B, at 29a. The district court specifically noted that the Human Resources Director, who would have been responsible

for enforcement of the hospital's anti-discrimination policy, was himself culpable of many of the discriminatory and retaliatory actions complained of by Ms. Bryant. App. B, at 30a. In addition, the district court recounted the substantial evidence in the record that demonstrated ARMC's malice and reckless indifference towards Ms. Bryant's rights. App. B, at 30a-34a. Significantly, ARMC never disavowed any of actions of its employees in refusing to promote Ms. Bryant either to the surgical tech positions or to the nursing positions she sought. Instead, ARMC created several pretextual explanations for not promoting her to those positions, which reasons were completely refuted at trial.

In its post-trial order of June 5, 2002, the district court denied Petitioner's request to enhance the back-pay award to compensate her for the negative income-tax consequences of the award. App. B, at 37a. The court determined that Ms. Bryant's request was "a novel theory" and that she had already received significant awards of compensatory and punitive damages. *Id.*

On appeal, the Fourth Circuit Court of Appeals affirmed the judgment of the district court in all respects, except for the issue of punitive damages. The court of appeals began its analysis of the punitive damages issue by stating, "The review of a jury's award of punitive damages is . . . reviewed 'less deferentially than are factual findings.'" App. A, at 18a (quoting *Atlas Food Sys. & Svcs. v. Crane Nat'l Vendors*, 99 F.3d 587, 594 (4th Cir. 1996)). The court of appeals vacated the jury's award of punitive damages based on its own, independent review of the record. According to the court of appeals, ARMC's "widespread anti-discrimination efforts . . . preclude the award of punitive damages in this case." App. A, at 20a.

With respect to the tax issue on cross-appeal, the court of appeals summarily affirmed the district court's refusal to enhance the award of back pay as a proper exercise of discretion in formulating equitable relief. App. A, at 20a, n.5.

## SUMMARY OF THE ARGUMENTS

The decision of the Fourth Circuit creates a split of authority among the various circuit courts of appeals on the issue of the appropriate level of deference that should be afforded to a jury's determination of an employer's liability for punitive damages in an employment discrimination case. The Fourth Circuit disregarded the traditional standard of deference to jury findings of fact, but instead substituted its own review of the evidence for that of the jury. Not only does this decision depart from the vast majority of appellate decisions on this issue, but it also raises serious Seventh Amendment concerns because the court of appeals re-examined the jury's factual findings underlying the question of Respondent's liability for punitive damages. The Fourth Circuit improperly reviewed the evidence *de novo* and made its own factual finding that ARMC had established the good-faith exception to punitive damages recognized by this Court in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999). In doing so, the court failed to view the record evidence in the light most favorable to Ms. Bryant and failed to recognize the *Kolstad* good-faith showing as an affirmative defense on which ARMC bore the burden of pleading and proof.

The court of appeals also improperly applied the good-faith defense to punitive damages where the employee who was primarily culpable for the discrimination and retaliation was himself responsible for the administration and enforcement of the hospital's alleged anti-discrimination policies. In so holding,

the court of appeals in this case created a split of authority among the circuits about whether the good-faith defense is applicable where liability is based on the acts of a senior manager who may be considered a proxy for the employer or where the employer's liability is direct.

Finally, the consideration of the potential income-tax consequences of a back-pay award is an important issue on which there is also a split of authority that should be resolved by this Court. The court of appeals summarily dismissed this issue in a footnote as a matter of discretion for the district court; however, the district court's discretion was infected by its erroneous commingling of the separate purposes of compensatory and punitive damages. Both the district court and the court of appeals failed to recognize the tax consequences of the back pay award as a necessary component of make-whole relief under Title VII.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT IN THE CIRCUITS REGARDING THE APPROPRIATE LEVEL OF DEFERENCE TO BE AFFORDED TO JURY DETERMINATIONS OF LIABILITY FOR PUNITIVE DAMAGES.

The Fourth Circuit incorrectly applied a non-deferential standard of review to the jury's determination that ARMC's discrimination and retaliation against Ms. Bryant justified an award of punitive damages. According to the Fourth Circuit, "[t]he review of a jury's award of punitive damages is . . . reviewed 'less deferentially than are factual findings.'" App. A, at 18a (quoting *Atlas Food Sys. & Svcs. v. Crane Nat'l Vendors*, 99 F.3d 587, 594, 595 (4th Cir. 1996)). Unfortunately, the Fourth Circuit confused the standard for reviewing the *amount* of the

punitive damage award[3] with the standard for reviewing the underlying factual determination of *liability* for punitive damages. *See* App. A, at 18a ("The jury's determination of the *amount* of punitive damages is 'not a factual determination about the degree of injury but is, rather, an almost unconstrained judgment or policy choice about the severity of the penalty to be imposed, *given the jury's underlying factual determinations about the defendant's conduct.*'") (emphasis added) (quoting *Atlas Food*, 99 F.3d at 595). The court of appeals did not view the facts and inferences in the light most favorable to Ms. Bryant, nor did the court inquire whether any reasonable jury could have found for her on the good-faith defense to punitive damages set forth in *Kolstad*.[4] Instead, the court improperly conducted its

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[3] Although ARMC's primary challenge was to the amount of the punitive award, the Fourth Circuit decision did not address those arguments. In any event, the amount of the punitive award here does not appear to present any constitutional issues, because the award was less than the statutory cap on such damages under 42 U.S.C. § 1981a, and the punitive award was only 2.33 times the amount of actual damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).

[4] Although this Court in *Kolstad* did not expressly state which party has the burden of proof on the issue of good-faith efforts to comply with Title VII, so as to preclude punitive damages, most circuit courts of appeals have characterized it as an affirmative defense on which the employer bears the burden of proof. *E.g.*, *Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 385 (2d Cir. 2001); *Romano v. U-Haul Int'l*, 233 F.3d 655, 670(1st Cir. 2000); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999). *See generally* David D. Powell, Jr. & Catherine C. Crane, *Complying with the Mandate of* Kolstad*: Are Your Good Faith Efforts Enough?*, 36 Tulsa L. J. 591, 600 (2001) ("[T]he *Kolstad* Court articulated a 'good faith efforts' defense to the imposition of punitive damages."). The Tenth and Third Circuits have recognized this as an unsettled issue. *Cadena v.*

(Cont'd)

own review of the record and made its own determination from sharply disputed evidence.

The Fourth Circuit's approach in this regard is contrary to the vast majority of the circuit courts of appeals. This Court should grant a writ of certiorari to resolve the split of authority on this question. Almost every other circuit court of appeals that has addressed this issue has recognized that the factual findings underlying a jury's determination that a defendant should be liable for punitive damages generally should not be disturbed on appeal.

The Courts of Appeals from the First, Second, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have all applied the traditional, deferential standard in reviewing jury verdicts for punitive damages in employment discrimination cases where the employer raised the *Kolstad* defense of good-faith efforts to comply with the anti-discrimination statutes. *See Romano v. U-Haul Int'l*, 233 F.3d 655 (1st Cir. 2000) ("[B]ased on the evidence that was presented to the jury, construed most favorably to the appellee, we find that the jury's conclusion [rejecting the good-faith defense] was reasonable, and we will not disturb the verdict."); *Marrero v. Goya of P.R., Inc.*,

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(Cont'd)

*Pacesetter Corp.*, 224 F.3d 1203, 1209 n.4 (10th Cir. 2000) ("It is unclear whether the good-faith compliance standard set out in *Kolstad* represents an affirmative defense on which the defendant bears the burden of proof or whether the plaintiff must disprove the defendant's good-faith compliance with Title VII."); *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1209 & n.4 (10th Cir. 2002) (recognizing uncertainty); *Medcalf v. Trustees of Univ. of Pa.*, No. 02-2861, 2003 WL 21843021, *7, n.1 (3d Cir. July 30, 2003) (same). In the instant case, the Fourth Circuit did not expressly state which party bears the burden of proof, but rather made its own findings without regard to burden of proof.

304 F.3d 7, 29-30 (1st Cir. 2002) ("Based on the evidence presented at trial, . . . the jury reasonably could have found that [defendant] made no such effort [(*i.e.*, good-faith efforts to comply with the requirements of Title VII)], but rather acted with 'reckless disregard' for [plaintiff's] rights."); *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376, 385 (2d Cir. 2001) (stating that the *Kolstad* defense of good-faith efforts to comply with Title VII "cannot be said to have been established as a matter of law"); *Hall v. Consolidated Freightways Corp.*, 337 F.3d 669, 675 (6th Cir. 2003) (holding that the question of punitive damages was properly submitted to the jury because "the record is replete with testimony refuting Defendant's alleged 'good faith' efforts"); *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478, 483 (7th Cir. 2003) (applying *Kolstad* standard and concluding that "there was sufficient evidence for a jury to believe that [the employer defendant] failed to engage in good faith efforts at Title VII compliance"); *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1009 (8th Cir. 2000) ("[T]here is substantial evidence from which a reasonable jury could find [defendant] liable for punitive damages under the clarified standards of *Kolstad*."); *Madison v. IBP, Inc.*, 257 F.3d 780, 795-96 (8th Cir. 2001) (rejecting *Kolstad* good-faith defense where employer had a corporate policy against racial and sexual discrimination, maintained an affirmative action plan, and conducted annual training for plant managers, but plaintiff adduced evidence that the policies were not carried out), *cert. granted on other grounds, vacated and remanded for further consideration in light of National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), 536 U.S. 919 (2002) (mem.); *Swinton v. Potomac Corp.*, 270 F.3d 794, 811 (9th Cir. 2001) (rejecting the *Kolstad* good-faith defense based on the evidence of record, viewed with appropriate deference to the jury); *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000) ("Because sufficient evidence was presented on which a jury could have found

[defendant] did not make good faith efforts to comply with Title VII, this court will not enter judgment as a matter of law in favor of [defendant] on the question of punitive damages."); and *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248-49 (10th Cir. 1999) (applying *Kolstad*, stating "[o]ur review of the record leaves us unconvinced that [defendant] made a good faith effort to educate its employees about the ADA's prohibitions").

The Third Circuit appears not to have rendered any published decisions in employment discrimination cases applying *Kolstad*'s good-faith defense to punitive damages. Nevertheless, in *Alexander v. Riga*, 208 F.3d 419 (3d Cir. 2000), the court addressed the issue of punitive damages in the analogous civil rights context of the Fair Housing Act. There, the court incorporated the holding of *Kolstad* and recognized that the issue of a landlord's alleged good-faith defense to punitive damages under the FHA was a question of fact for the jury. *Alexander*, 208 F.3d at 433-34. Also, in *Gagliardo v. Connaught Labs., Inc.*, 311 F.3d 565 (3d Cir. 2002), the Third Circuit affirmed an award of punitive damages under the ADA, based on the liability standard announced in *Kolstad*, although the employer did not raise the good-faith defense. The court applied the appropriate deferential standard in reviewing the factual findings underlying the punitive award and ruled that "there was sufficient evidence to support the jury's award of punitive damages." *Id.* at 573.

The authority from the Fifth Circuit on the good-faith defense is somewhat divergent. In *Green v. Administrators of the Tulane Educational Fund*, 284 F.3d 642 (5th Cir. 2002), the court of appeals affirmed the district court's entry of judgment as a matter of law in favor of the employer on the issue of punitive damages in a sexual harassment and retaliation claim under Title VII. The trial court ruled that "no reasonable juror

could conclude that [the employer] did not act in good faith." *Id.* at 653. The court of appeals agreed with the trial court's decision not to submit punitive damages to the jury, because "there is evidence to support the good faith ruling." *Id.* at 653-54. The *Green* court appears to have articulated the standard in reverse. The issue should have been whether there was any material evidence to counter the good-faith defense. Previously, in *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278 (5th Cir. 1999), the Fifth Circuit took a much more deferential approach to the jury's role. In rejecting the employer's arguments regarding the good-faith defense to punitive damages, the *Deffenbaugh* court stated, "[f]or JMOL purposes, the evidence of [the employer's] antidiscrimination good faith was certainly not so overwhelming that reasonable jurors could not conclude otherwise." *Id.* at 286.

The Eleventh Circuit has also recognized the proper level of deference that should be afforded to jury findings of liability for punitive damages, albeit not in connection with the good-faith portion of *Kolstad*. In *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002), the court of appeals reversed the district court's decision to submit the question of punitive damages to the jury in a hostile work environment case. Although the *Miller* court ultimately determined that the employer did not have actual notice of the offensive behavior, the court applied the proper, deferential standard in vacating the jury's award of punitive damages. *Id.* at 1280 ("Even viewing the evidence in the light most favorable to [plaintiff], we do not find sufficient evidence on the record to support the necessary finding of malice or reckless indifference by [the employer defendant] for the federal rights of [plaintiff] to justify the award of punitive damages."). Several other Eleventh Circuit decisions have also applied the appropriate deferential standard in reviewing jury verdicts of punitive damages in employment discrimination

cases. *See, e.g., Bogle v. McClure*, 332 F.3d 1347, 1359-60 (11th Cir. 2003) (affirming punitive damages awards in reverse race discrimination claims under 42 U.S.C. § 1983); *Lambert v. Fulton Co., Ga.*, 253 F.3d 588, 597-98 (11th Cir. 2001) (same); *Alexander v. Fulton Co., Ga.*, 207 F.3d 1303, 1337-38, 1344 (11th Cir. 2000) (same); *EEOC v. W & O, Inc.*, 213 F.3d 600, 611 (11th Cir. 2000) ("We conclude that there was sufficient evidence for the jury to find that [defendant] acted with reckless indifference to the civil rights of its pregnant employees.").

The reasons for giving a jury's findings of fact broad deference and respect are both practical and constitutional. As Justice Ginsburg noted in her dissenting opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), "district courts [and jurors] view the evidence not on a 'cold paper record,' but 'in the living courtroom context.' They can assess from the best seats the vital matter of witness credibility." *Id.* at 448 (Ginsburg, J., dissenting)[5] (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438 (1996)); *see also Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) ("It is not our role . . . to substitute our judgment for that of the jury.").

Of course, the jury's traditional role as the finder of fact is rooted in the Seventh Amendment, which provides, in relevant part, that "no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const., amend. VII. Numerous appellate

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[5] Justice Ginsburg specifically noted that one of the underlying determinations relating to punitive damages that has been characterized as fact finding is "whether the defendant acted in good faith." *Id.* at 446. That issue clearly encompasses the *Kolstad* defense to punitive damages.

courts have recognized the constitutional implications of careful deference to jury findings underlying an award of liability for punitive damages. *E.g.*, *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 188 F.3d 278, 285 (5th Cir. 1999) ("'*[I]t is the [Seventh Amendment] function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.*'") (emphasis and second alteration in original) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969)).

Here, the court of appeals did not view the evidence of record in the light most favorable to Ms. Bryant, nor did the court inquire whether, based on such view of the evidence, a reasonable jury could have rejected ARMC's claims of good-faith compliance with Title VII. Instead, the court conducted its own review of the record and unearthed four items that, according to the court, conclusively demonstrated ARMC's good-faith efforts to comply with the law: (1) "an extensively implemented organization-wide Equal Employment Opportunity policy";[6] (2) a grievance policy, which encouraged employees to report claims of harassment, discrimination, and general dissatisfaction, and which informed employees that they would not be retaliated against for making such complaints; (3) "a carefully developed diversity training program that included formal training classes and group exercises for hospital

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[6] The hospital's written policy against discrimination was the only item raised by ARMC at trial, both in its motion for JMOL and in closing argument, to support its good-faith defense to punitive damages. In *Duro-Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098 (Fed. Cir. 2003), the Court of Appeals for the Federal Circuit held that it would be a violation of the Seventh Amendment to enter JMOL post trial on grounds not raised by the defendant in a pre-verdict motion for JMOL. *Id.* at 1107 (citing *Morante v. American Gen. Fin. Ctr.*, 157 F.3d 1006, 1010 (5th Cir. 1998)).

employees"; and (4) "voluntar[y] monitor[ing] of departmental demographics as part of an on-going effort to keep the employee base reflective of the pool of potential employees in the area." App. A, at 19a-20a. Contrary to the court's statement that Ms. Bryant does not dispute the existence of ARMC's alleged "widespread anti-discrimination efforts," App. A, at 20a, Ms. Bryant vigorously disputed whether the hospital ever enforced its written policies. The court of appeals clearly overstated the evidence regarding ARMC's alleged good-faith efforts and disregarded substantial evidence that no such efforts were ever undertaken. In so ruling, the court usurped the jury's role as fact finder on the issue of whether the hospital engaged in good-faith, anti-discrimination efforts sufficient to insulate it from liability for punitive damages under *Kolstad*.

This Court should grant certiorari on this issue to conform the Fourth Circuit's opinion below to the proper standard of review recognized by almost every other circuit.

## II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT IN THE CIRCUITS REGARDING WHETHER THE *KOLSTAD* GOOD-FAITH DEFENSE TO PUNITIVE DAMAGES IS APPLICABLE WHERE THE EMPLOYEE RESPONSIBLE FOR THE DISCRIMINATION IS SUFFICIENTLY SENIOR TO BE A PROXY FOR THE EMPLOYER OR WHERE THE EMPLOYER IS OTHERWISE DIRECTLY LIABLE FOR THE DISCRIMINATORY ACTS.

The Fourth Circuit also erred in applying the good-faith defense of *Kolstad* in this case because the primary alleged wrongdoer was himself also responsible for implementing and

enforcing the hospital's anti-discrimination policy. In other words, ARMC should not be allowed to escape liability for punitive damages by arguing that its managerial employee acted contrary to his own good-faith efforts to comply with the law. The Fourth Circuit's decision in this case thus creates another split in the circuits about the proper application of the *Kolstad* good-faith defense to punitive damages in employment discrimination cases.

In *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493 (9th Cir. 2000), the Ninth Circuit Court of Appeals held that the *Kolstad* good-faith defense does not even apply where the alleged wrongdoer is sufficiently high in the management of the company so as to be a proxy for the employer. *Id.* at 516. The *Passantino* court held that *Kolstad* did not alter the common-law rule "that an individual sufficiently senior in the corporation must be treated as the corporation's proxy for purposes of liability." *Id.* (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788-90 (1998)). The Ninth Circuit actually relied on the *Kolstad* Court's apparently different treatment of the two employees who were responsible for the gender discrimination against Ms. Kolstad:

> After announcing that the standard governing the availability of punitive damages in Title VII cases requires proof of "malice or reckless indifference" to the rights guaranteed by Title VII, the [*Kolstad*] Court discussed how the district court should apply the standard on remand. For Allen, the Court stated that because he was the highest position within the Association, the only question for the district court would be whether or not he acted with malice or reckless indifference. For Wheat, the Court noted that the district court would have to determine

> whether or not Wheat served in a "managerial capacity" and whether or not he behaved with "malice or reckless indifference."

*Id.* (quoting *Kolstad*, 527 U.S. at 546). The *Passantino* court viewed the *Kolstad* defense as an extension of the affirmative defense recognized in *Faragher* and *Ellerth*, to the punitive damages context. *Id.*

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court addressed an employer's vicarious liability under Title VII for sexual harassment by a supervisory employee against a subordinate employee. In *Ellerth*, this Court recognized the well-settled principle of alter ego or proxy liability: "Subsection (a) [of Restatement (Second) of Agency, § 219(2)] addresses direct liability, where the employer acts with tortious intent, and indirect liability, *where the agent's high rank in the company makes him or her the employer's alter ego*." 524 U.S. at 758 (emphasis added). Likewise, in *Faragher*, this Court recognized that the practice of holding an employer liable for the acts of "high-echelon officials" is well established. For example, the Court observed that, in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the alleged harasser, who was the president of the company, "was indisputably within that class of an employer organization's officials who may be treated as the organization's proxy." *Faragher*, 524 U.S. at 789. This Court in *Kolstad* did not overrule the alter ego or proxy theory with respect to holding an employer liable for punitive damages. In fact, as the Ninth Circuit recognized in *Passantino*, the *Kolstad* opinion appears to have applied the theory, as reflected in the instructions to the lower court on remand. 212 F.3d at 516.

In applying the good-faith defense to the instant case, the Fourth Circuit disregarded the alter ego or proxy theory. The

three employees specifically mentioned by the Fourth Circuit as being responsible for the discrimination and retaliation against Ms. Bryant–the Human Resources Director, the Chief Nurse Executive, and the Director of Surgical Services (App. A, at 19a, n.4)—were all sufficiently senior to have acted on behalf of ARMC. Each of them was a policymaker for the hospital or at least had the power to hire and fire employees on behalf of the hospital. Thus, their actions should have been deemed to be the actions of ARMC and, by definition, cannot have been contrary to ARMC's policies.

Similarly, in *Deters v. Equifax Credit Info. Servs.*, 202 F.3d 1262 (10th Cir. 2000), the Tenth Circuit Court of Appeals held that the *Kolstad* good-faith defense to punitive damages applies only in cases of vicarious liability, not where liability "is premised on a theory of direct liability." *Id.* at 1271. The *Deters* case was a sexual harassment case in which the plaintiff complained to the person specifically designated by the company to implement and enforce the company's policy against discrimination; however, that person did not respond adequately to plaintiff's complaints, but instead demonstrated malice and reckless indifference to plaintiff's rights. The Tenth Circuit held that the employer could not attempt to shield itself from punitive damages under the good-faith defense because of the direct actions of the company's designee. *Id.*; *see also Swinton v. Potomac Corp.*, 270 F.3d 794, 811 (9th Cir. 2001):

> Surely, [the employer defendant] cannot claim to have *implemented* its anti-harassment policy in good faith (even if it were conceived in good faith) when the very employee . . . charged with carrying it out vis-a-vis [plaintiff] laughed along with the "nigger" jokes, did nothing to stop them, and never reported the repeated incidents to higher management.

Here, the court of appeals failed to consider the issue of ARMC's direct liability, which had been confirmed by the district court:

> The evidence is . . . more than sufficient to support the conclusion that any written policy was not implemented in good faith and that the discriminatory and retaliatory actions directed towards [Petitioner] were sufficiently widespread among multiple persons with managerial and administrative responsibilities *to treat those acts as the intentional actions of the employer.*

App. B, at 29a (emphasis added). In addition, in analyzing the punitive damages issue, the court of appeals appears to have ignored Ms. Bryant's claims of unlawful retaliation. Indeed, the court of appeals actually stated that the hospital's grievance policy was evidence of its good-faith efforts to comply with the law. Ironically, Ms. Bryant used the grievance mechanism to complain about race discrimination with respect to her repeated rejection for the surgical tech positions and about the racial make-up of the surgical tech training class; yet, she was retaliated against for raising such complaints. The court of appeals cited the very mechanism that allowed Ms. Bryant to be retaliated against as evidence to shield the hospital from liability for punitive damages.

Especially troubling is the paradoxical analysis the court of appeals used in its discussion of the actions of the Director of Human Resources, Richard Lowe. Two of the four items mentioned by the court as evidence of ARMC's good-faith efforts to comply with Title VII were actually the responsibility of Mr. Lowe: (1) the alleged diversity training program consisting of formal classes and group exercises, and (2) the alleged routine monitoring of the hospital's employee

demographics. The court used Mr. Lowe's unlawful actions as the basis for ARMC's underlying liability for discrimination and retaliation while simultaneously using his allegedly commendable efforts to comply with Title VII to shield the hospital from liability for punitive damages under the *Kolstad* good-faith defense. This twist of logic would require Mr. Lowe to take on a persona akin to Dr. Jekyll and Mr. Hyde—that in discriminating and retaliating against Ms. Bryant he disregarded his own good-faith efforts to comply with the law. This fallacy illustrates precisely the reason why appellate courts are ill suited to second-guess a jury's factual findings.

The finding of the court of appeals that the unlawful acts of discrimination and retaliation against Ms. Bryant were contrary to ARMC's good-faith efforts to comply with Title VII is also curious because ARMC never disavowed the actions of any of its employees. Instead, the hospital defended this case by fabricating several pretextual reasons for failing to promote Ms. Bryant to the positions she sought. ARMC's liability for the unlawful discrimination and retaliation was, therefore, direct, and its liability for punitive damages likewise should have been direct. *See Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478, 483 (7th Cir. 2003) (holding that evidence that the employer had a formal anti-discrimination policy was insufficient to establish good-faith efforts to comply with Title VII, especially when there was evidence that the employer attempted to fabricate a business reason for plaintiff's termination); *see also Hall v. Consolidated Freightways Corp.*, 337 F.3d 669, 675 (6th Cir. 2003) ("[A] plaintiff may demonstrate that the employer acted with the requisite mental state (reckless disregard for the plaintiff's federally protected rights) by showing that the defendant's employees lied, either to the plaintiff or to the jury, in order to cover up their discriminatory actions."). This case is not like a sexual harassment case, where a rogue

employee violates the employer's sexual harassment policies, without the employer's knowledge or acquiescence, and for the harasser's own, personal gratification. Here, the actions complained of were undeniably corporate actions,[7] taken by high-level corporate employees, directly in furtherance of the corporation's policies and objectives.

Under either the alter ego/proxy theory of the Ninth Circuit in *Passantino*, or the direct liability approach of the Tenth Circuit in *Deters*, the court of appeals should not have applied the good-faith defense to preclude punitive damages in this case. This Court should grant certiorari to resolve the split in the circuits on this important issue of whether the *Kolstad* defense is available in such situations.

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[7] In *Faragher* and *Ellerth*, this Court drew a sharp distinction between cases that involve a "tangible employment action" and those that do not. A "tangible employment action" is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. According to the *Ellerth* Court, because "[a] tangible employment decision requires an official act of the enterprise, a company act, . . . a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Id.* at 762. Similarly, in the sister case of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), this Court stated, "there is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown." *Id.* at 789 (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70-71 (1986)). The *Faragher* Court quoted with approval from Justice Marshall's concurring opinion in *Meritor*, "'[W]hen a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer.'" *Faragher*, 524 U.S. at 790 (quoting *Meritor*, 477 U.S. at 75 (Marshall, J. concurring in judgment)).

## III. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG LOWER FEDERAL COURTS REGARDING WHETHER THE "MAKE WHOLE" PURPOSE OF THE ANTI-DISCRIMINATION STATUTES REQUIRES THE TRIAL COURT TO CONSIDER THE INCOME TAX CONSEQUENCES OF A LUMP-SUM AWARD OF BACK PAY.

One of the primary aims of Title VII is to make victims of employment discrimination whole. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), this Court reviewed the legislative history behind the "make whole" purpose of Title VII:

> "The provisions of this subsection are intended to give the courts *wide discretion in exercising their equitable powers to fashion the most complete relief possible*. . . . [T]he courts have stressed that the scope of relief under . . . the Act is intended to *make the victims of unlawful discrimination whole*, and that the attainment of this objective rests not only upon the elimination of the particular employment practice complained of, but also *requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination*."

*Id.* at 421 (emphasis added) (quoting 118 Cong. Rec. 7168 (1972)). The enhancement of Ms. Bryant's back-pay award to account for the increased income tax burden she will face is necessary to place her, as nearly as possible, in the position in

which she would have been absent ARMC's unlawful discrimination and retaliation against her.

Several courts have specifically authorized the remedy of enhancing back-pay awards to account for negative tax consequences. For example, in *O'Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443 (E.D. Pa. 2000), the court enhanced the award of back pay and front pay to an ADEA plaintiff to compensate him for the negative tax consequences of receiving a lump-sum payment. The court stated,

> "It is not how much you make, it is how much you *keep*." The goal of the ADEA is to allow plaintiff to *keep* the same amount of money as if he had not been unlawfully terminated. Compliance with this goal requires . . . reimbursement for the higher taxes [plaintiff] must pay on his back wages caused by getting this money in a lump sum.

*Id.* at 447. The court concluded that "negative tax consequences are an appropriate remedy pursuant to the 'make whole' provisions of the ADEA." *Id.*

Most recently, in *Jordan v. CCH, Inc.*, 230 F. Supp.2d 603 (E.D. Pa. 2002), the district court awarded an additional $33,124.00 to a plaintiff in an age discrimination case to compensate him for "the negative tax impact of Plaintiff's back pay award." *Id.* at 617. The *Jordan* court accepted the reasoning of the *O'Neill* court and agreed that such remedy was necessary to comply with the "make-whole" doctrine of anti-discrimination statutes, such as the ADEA. *Id.*

Similarly, in *EEOC v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364 (S.D. Fla. 1998), the court stated that "a district court, in the exercise of its discretion, may include a tax component

in a lump sum back pay award to compensate prevailing Title VII plaintiffs." *Id.* at 1380.[8]

Also, in *Sears v. Atchison, Topeka & Santa Fe Ry. Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984), the Tenth Circuit Court of Appeals approved the district court's award of additional money to compensate the members of the plaintiff class for the negative tax consequences of a lump-sum back pay award. The *Sears* court based its ruling on the district court's "wide discretion in fashioning remedies to make victims of discrimination whole." *Id.* The court stated that adding a tax component to a back pay award is especially appropriate where the litigation is protracted.[9]

In addition, in *Gelof v. Papineau*, 648 F. Supp. 912 (D. Del. 1986), *aff'd in part and vacated in part*, 829 F.2d 452 (3d Cir. 1987), the district court enhanced the back-pay award to a plaintiff in an age discrimination case by approximately $85,000 to compensate her for additional tax liability.

Other courts have refused to enhance back-pay awards to account for the negative tax consequences relating to the

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[8] The *Joe's Stone Crab* court ultimately declined to award additional money to offset the tax consequences of the back pay award because the plaintiff there failed to provide sufficient evidence to allow the court to make the calculation. Here, however, Ms. Bryant submitted an affidavit of a tax professional describing the adverse tax consequences of the lump-sum back pay award. This is the same form of evidence relied on by the plaintiff in the *O'Neill* case. *See* 108 F. Supp. 2d at 447 (relying on opinion and calculation of plaintiff's economic expert attached as exhibit to plaintiff's post-trial motion to mold the verdict).

[9] Although the court stated that "[a] tax component may not be appropriate in a typical Title VII case," because of a three-year income averaging provision of the tax code, *id.*, that income-averaging provision was repealed in 1986.

timing of such awards. *E.g.*, *Dashaw v. Pena*, 12 F.3d 1112, 1116 (D.C. Cir. 1994) ("Absent an arrangement by voluntary settlement of the parties, the general rule that victims of discrimination should be made whole does not support 'gross-ups' of backpay to cover tax liability."); *Hukkanen v. International Union of Operating Engineers, Hoisting & Portable Local No. 101*, 3 F.3d 281, 287 (8th Cir. 1993); *Blim v. Western Elec. Co.*, 731 F.2d 1473 (10th Cir. 1984); *Meacham v. Knolls Atomic Power Lab.*, 185 F. Supp. 2d 193, 238 (N.D.N.Y. 2002); *Best v. Shell Oil Co.*, 4 F. Supp. 2d 770, 776 (N.D. Ill. 1998).

The district court here refused to enhance the back pay award, largely because Ms. Bryant had received substantial verdicts for emotional distress and punitive damages and did not need further compensation. The district court abused its discretion in that regard, because it failed to recognize the separate aims of compensatory damages and punitive damages. As this Court has recognized, "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."). By refusing to enhance the back-pay award, the district court in effect diluted the jury's verdicts for compensatory and punitive damages. The court of appeals ratified the district court's error by ruling that the district court did not abuse its discretion on this issue.

This Court should grant certiorari to resolve the split among the various lower courts about whether tax enhancements to back-pay awards are a proper part of the "make whole" purpose of Title VII.

## CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that the Court grant a writ of certiorari on the above questions presented. In the alternative, Petitioner requests this Court summarily to reverse the opinion and judgment of the Fourth Circuit below with respect to punitive damages and to reinstate the jury verdict in full.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED JUNE 27, 2003**

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

No. 02-2147

WANDA M. BRYANT, individually and as class representative on behalf of all persons similarly situated,

*Plaintiff-Appellee,*

v.

AIKEN REGIONAL MEDICAL CENTERS INCORPORATED,

*Defendant-Appellant.*

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No. 02-2192

WANDA M. BRYANT, individually and as class representative on behalf of all persons similarly situated,

*Plaintiff-Appellant,*

v.

AIKEN REGIONAL MEDICAL CENTERS INCORPORATED,

*Defendant-Appellee.*

Appeals from the United States District Court for the District of South Carolina, at Aiken. Cameron M. Currie, District Judge. (CA-00-1224-22BC)

Argued: May 8, 2003.

Decided: June 27, 2003.

*Appendix A*

Before WILKINSON, NIEMEYER, and KING, Circuit Judges.

**OPINION**

WILKINSON, Circuit Judge:

Plaintiff Wanda M. Bryant filed suit against defendant Aiken Regional Medical Centers, Inc. (ARMC), alleging that ARMC had denied her a promotion on several occasions both because of her race and in retaliation for her complaints about discrimination in ARMC's hiring policies. A jury found in her favor and awarded her backpay, compensatory damages for emotional distress, and punitive damages. The district court declined to overturn the jury's verdict. We affirm the jury's finding of liability and its award of backpay and compensatory damages for emotional distress, but we reverse the award of punitive damages.

I.

Wanda Bryant, an African-American woman, was trained as a surgical technician in the United States Army Reserves. She received her diploma in that field from the Army in February 1998. After completing her medical training, she took a full-time job as a surgical technician at the Medical College of Georgia. She also worked part-time—between twenty and thirty hours a month—as a surgical technician for ARMC on an as-needed basis. She continued working part-time for ARMC until December 1990, when she was called up to active duty in Saudi Arabia during the first Gulf War. While in Saudi Arabia, she served as a surgical technician with the 382nd Field Hospital unit.

*Appendix A*

Some time after returning from the Persian Gulf, Bryant applied for a full-time position as a surgical technician with ARMC. She was informed that there were no openings for surgical technicians, but was offered a position as a full-time central services technician. The position of central services technician offered substantially less pay and required significantly less skill than the position of surgical technician. Central service technicians are chiefly responsible for assembling trays of surgical equipment for upcoming procedures and cleaning instruments after surgery. Surgical technicians, by contrast, act as direct assistants to doctors during surgical procedures in the operating rooms. While in Saudi Arabia with her reserve unit, for example, Bryant worked as a surgical technician on surgeries involving everything from war casualties and burn victims to the delivery of newborn babies. After receiving ARMC's offer, Bryant agreed to take the lower-status position of central services technician in the hope that a surgical technician position would become available.

While employed at ARMC as a central services technician, Bryant enrolled in an associate nursing degree program at the University of South Carolina-Aiken. She later applied and was accepted in an ARMC nursing scholarship program, under which ARMC agreed to give her a thousand dollars per semester towards her university tuition. As part of this scholarship program, Bryant agreed to work for ARMC for a year and a half in exchange for every year of tuition assistance she received from ARMC. She attended school full-time while continuing to work full-time as a central services technician at ARMC. She also began to work part-time on an as-needed basis for another employer, St. Joseph's Hospital, in her preferred position of surgical technician.

*Appendix A*

There was a shortage of surgical technicians throughout ARMC in both 1997 and 1998. In October 1997, Bryant saw a job as a surgical technician posted on an ARMC employee bulletin board. Bryant applied for the job, complying with required procedures and discussing her application with her manager and the perioperative surgical coordinator. She received no response of any kind to her application.

Three months later, in January 1998, the surgical technician position was still open, and Bryant submitted a second application for the job. This time, she received a response. The hiring managers informed her that in order to become a surgical technician she first had to complete a training program. When Bryant told them that she had already been certified as a surgical technician by the Army—and that she had in fact previously worked as a surgical technician for ARMC—the managers reiterated that she would have to complete the training program at the hospital in order to become a surgical technician. Because training was only offered during hours when Bryant was unavailable because of her class schedule at nursing school, she was not offered the job.

The surgical technician position still had not been filled in April 1998. Because Bryant's school semester had ended and she was therefore available for training, she reapplied once again for the same job.

Bryant also complained, she testified, to her supervisor and to the hospital's service excellence coordinator (who was a designated point person for race discrimination complaints) that she believed she was being discriminated against in the

promotion process because of her race. The service excellence coordinator told her that he would "check into it" and get back to her with a response. She never heard anything back from him. Shortly after her complaint, however, her treatment at work changed dramatically. Previously, Bryant testified, she had been recognized as a good worker and the most experienced central service technician on her shift; in fact, she had been made a de facto supervisor of inexperienced technicians. After her discussion with the service excellence coordinator, however, she testified that she suddenly became subject to constant "nitpicky" critiques from ARMC management and that the atmosphere became "hostile." And once again, Bryant was not offered the surgical technician position, which remained open until September 1998 despite the acknowledged shortage ARMC was suffering throughout that entire year.

Bryant graduated from nursing school in December 1998, at a time when ARMC was suffering from a nursing shortage that had plagued the hospital throughout 1998. In the beginning of December, Bryant applied for a series of nursing positions that had been posted at ARMC. ARMC does not dispute that she would have qualified for at least two of these positions upon receiving her nursing license.[1] Beyond paper

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1. ARMC argues that Bryant had not yet received her nursing license when she submitted her job application and therefore was not eligible to be hired. Bryant testified, however, that no such policy had ever been communicated to her. More to the point, ARMC's own witness testified that ARMC would interview nurses before they had formally received their nursing licenses. That policy certainly makes sense: in a nursing shortage, a hospital has every incentive to

(Cont'd)

qualifications, Bryant also had a documentary record of strong job performance. Her immediate supervisor in the central services department wrote her an unsolicited letter of recommendation, stating that Bryant exhibited "discipline, energy and commitment," that her work ethic was "a[n] example for others on staff," that she was "almost passionate about getting the job done right," that she frequently "volunteered to cover shifts or work overtime even with short notice," and that "others on staff look[ed] to [her] for advice and guidance."

Despite this recommendation, Bryant was interviewed for only one position. When she arrived for the interview, however, she was informed that the hiring nurse was unavailable. Bryant was interviewed instead by two staff nurses. She never heard back from any nurse in that department. She repeatedly contacted ARMC's human resources department throughout the application process, to no avail. She also contacted the chief nursing executive, who "just casually dismissed" Bryant's concerns and repeatedly put Bryant off because she didn't have time to discuss the issue. The chief nursing executive ultimately told Bryant that "she didn't see what the problem was" with a licensed nurse simply continuing to work as a central services technician. And the director of human resources responded to her concerns by informing her that he did not have a signed copy of her scholarship agreement, telling her that she should not

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(Cont'd)
secure employees who are on the verge of getting their nursing licenses, even if they could not begin work on the date they submit their application or are interviewed.

consider herself bound to work for ARMC any longer, and wishing her good luck in her future career.

Bryant finally decided that she had to seek employment as a nurse at other hospitals. She gave two weeks' notice to ARMC and resigned her position as a central services technician effective February 22, 1999. She took a nursing position at Barnwell County Hospital, a job which gave her lower pay and fewer employee benefits than the nursing positions at ARMC would have.

Bryant brought suit against ARMC under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. She alleged that ARMC had repeatedly discriminated against her in the job application process both because of her race and because she had complained about racial discrimination. The case went to trial, and the jury found that ARMC had refused to promote Bryant to the surgical technician position in retaliation for her complaints about racial discrimination. The jury also found that Bryant had been denied a promotion to the registered nurse position because she was African-American. The jury found that racial discrimination was not a factor, however, in ARMC's failure to offer Bryant a surgical technician position. Bryant was awarded $40,000 in compensatory damages for lost wages and benefits, $50,000 for emotional distress, and $210,000 in punitive damages. This appeal ensued.

II.

ARMC first argues that the district court erred in failing to grant judgment as a matter of law, or in the alternative a new trial, on Bryant's retaliation claims.

*Appendix A*

We review *de novo* the district court's ruling on ARMC's motion for judgment as a matter of law. *Dennis v. Columbia Colleton Med. Ctr.*, 290 F.3d 639, 644-45 (4th Cir. 2002). Under Fed. R. Civ. P. 50(b), the question is whether a jury, viewing the evidence in the light most favorable to Bryant, "could have properly reached the conclusion reached by this jury." *Id.* at 645 (citation omitted). If reasonable minds could differ about the result in this case, we must affirm the jury's verdict. *Id.* On the denial of ARMC's motion for a new trial, we review the district court's decision under Fed. R. Civ. P. 59 for abuse of discretion. *Id.* at 650. On a motion for a new trial, the district court may weigh the evidence and should grant a new trial only if "1) the verdict is against the clear weight of the evidence, 2) is based on evidence which is false, or 3) will result in a miscarriage of justice." *Id.*

A plaintiff can prove illegal retaliation under Title VII or § 1981 if he shows that "(1) he engaged in protected activity, (2) he suffered an adverse employment action at the hands of [his employer]; and (3) [the employer] took the adverse action because of the protected activity." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 190 (4th Cir. 2001). Once the plaintiff makes this case, the employer can defend itself by producing "evidence of a legitimate, non-discriminatory reason for taking the adverse employment action." *Id.* It is then up to the jury to decide whether the adverse action was actually taken for the proffered reason, or if it was intended as a retaliatory measure. When reviewing the judgment below, we examine the "full trial record to determine whether sufficient evidence supported the jury's

verdict" on the ultimate question of the alleged retaliatory discrimination. *Gibson v. Old Town Trolley Tours of Washington, D.C.*, 160 F.3d 177, 181 (4th Cir. 1998).

Bryant clearly engaged in protected activity. Title VII protects the right of employees to oppose any "unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-3 (2003). Employees are thus guaranteed the right to complain to their superiors about suspected violations of Title VII. *Thompson v. Potomac Elec. Power. Co.*, 312 F.3d 645, 650 (4th Cir. 2002). Bryant did exactly that. The jury heard testimony that she complained to both her immediate supervisor and the hospital's service excellence coordinator about her suspicion that she had not been promoted to surgical technician because of racial discrimination.

It is similarly beyond quarrel that Bryant suffered an adverse employment action. It has long been clear that failure to promote an employee constitutes an adverse employment action for the purposes of § 2000e-3. *Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981). Bryant was denied a promotion to the position of surgical technician when she applied for the third time in April 1998.

Bryant also presented evidence sufficient for a reasonable jury to find that ARMC's failure to promote her was the result of her complaints about suspected discrimination. She testified that after her complaints, her treatment at work changed dramatically. She went from being recognized as a superior employee to being faced with constant "nitpicky" criticisms and the repeated charge that "your job is not up

to par." The jury could have concluded from the evidence that this change in treatment was one manifestation of hospital management's retaliation against Bryant for her complaint. It was similarly a reasonable inference, particularly given the jury's ability to judge the credibility of several of ARMC's managerial employees, that this retaliation further manifested itself in the hospital's refusal to promote Bryant.

The reasonableness of this inference is supported by the lack of any real reason to deny Bryant the job. ARMC does not suggest that Bryant's work as a central services technician was subpar; indeed, there was substantial evidence that precisely the opposite was true. She had extensive experience as a surgical technician—including service in the Saudi Arabian trauma centers during wartime and even an extended stint at ARMC itself. Her skills were current, because she had been continuing to work part-time as a surgical technician at another hospital. And there was a conceded shortage of surgical technicians at ARMC at the time she applied. In light of all these factors, it was a reasonable inference for the jury to conclude that the service excellence coordinator (who was, after all, responsible for handling and resolving precisely such complaints) had shared Bryant's complaints with others in hospital management, and that Bryant had been denied her requested promotion because of those complaints.[2]

We therefore hold that there was sufficient evidence to support the jury's verdict on the issue of unlawful retaliation,

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2. Perhaps unsurprisingly, ARMC makes no effort to proffer a legitimate, non-discriminatory reason for refusing to promote Bryant to surgical technician.

and the district court did not abuse its discretion in refusing to grant a new trial on this score.

III.

ARMC next argues that the trial court should have granted judgment as a matter of law or a new trial on Bryant's claim that she was denied a promotion to nurse because of her race.

Under the framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Bryant must present evidence that "(1) [she] is a member of a protected group; (2) [she] applied for the position in question; (3) [she] was qualified for the position; and (4) [she] was rejected for the position under circumstances giving rise to an inference of unlawful discrimination."[3] *Brown v. McLean*, 159 F.3d 898, 902 (4th Cir. 1998). To defend itself, ARMC must then respond by "producing a legitimate nondiscriminatory reason for its decision." *Columbia Colleton Med. Ctr.*, 290 F.3d at 646. "Once the parties satisfy [these] relatively modest obligations . . . 'the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved that the defendant intentionally discriminated against [her] because of [her] race.'" *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (internal punctuation omitted)), *abrogated on other grounds*, *Desert Palace, Inc. v. Costa*,

3. In failure-to-promote cases such as this, "the framework of proof for disparate treatment claims . . . is the same for actions brought under Title VII, or § 1981, or both statutes." *Mallory v. Booth Refrig. Supply Co.*, 882 F.2d 908, 910 (4th Cir. 1989).

2003 WL 21310219 (U.S.) (evidentiary standard for mixed-motive jury instruction). We now review the jury's resolution of that final question under the standards set forth by Rule 50 and Rule 59.

Viewed in the light most favorable to Bryant, there was sufficient evidence to support her claim of racial discrimination. ARMC was suffering from the same nursing shortage that was plaguing the entire health care industry. In the context of this hiring crunch, ARMC had a commitment from Bryant that she would work for the hospital as a nurse—the scholarship program guaranteed ARMC first call on Bryant's services. And ARMC makes no argument that Bryant was a difficult or mediocre employee; indeed, there is significant evidence in the record to support the conclusion that she had an established record of excellent performance.

ARMC thus had every reason to hire Bryant. Instead, she was given the runaround for more than two months after applying for vacant nursing jobs for which she would have been fully qualified. Some of her applications were simply ignored. One ARMC manager told her that she saw no problem with a licensed nurse being stuck in a lower-skilled job in central services. And the director of Human Resources ultimately tried to nudge her out the door by releasing her from her commitment to the hospital and wishing her the best of luck in her future career. Moreover, almost two months after her departure, some of the nursing positions she had applied for were still unfilled. With no legitimate reason proffered for this treatment of a qualified applicant for a difficult-to-fill vacancy, we cannot say that there was no

reasonable basis for the jury to conclude that racial discrimination was the reason for the company's failure to hire Bryant.

On appeal, ARMC contends that Bryant did not offer evidence that she was treated differently from a similarly situated white applicant or that the hospital ever hired a less qualified white applicant for a position Bryant sought. This argument misapprehends the requirements of Title VII: Bryant is not required as a matter of law to point to a similarly situated white comparator in order to succeed on a race discrimination claim. *See Columbia Colleton Med. Ctr.*, 290 F.3d at 648-49 n.4 (holding that plaintiff need not prove that she was better qualified than a successful applicant if other circumstantial evidence suggests discrimination). We would never hold, for example, that an employer who categorically refused to hire black applicants would be insulated from judicial review because no white applicant had happened to apply for a position during the time frame in question. It is true that if ARMC argued that Bryant was not as well qualified as another applicant who was actually hired, Bryant could help her case as an evidentiary matter by establishing that she was better qualified than the other applicant. But ARMC has not made that argument here. However helpful a showing of a white comparator may be to proving a discrimination claim, it is not a necessary element of such a claim.

ARMC further argues that Bryant did not give the hospital enough time to review her nursing application because she left the hospital three weeks after receiving her state nursing license. (Bryant received her state license on

January 31, 1999. Her last day at ARMC was February 22, 1999.) Even if ARMC was genuinely unable to process her longstanding application during those three weeks, however, there was sufficient evidence in the record for the jury to conclude that ARMC would interview and hire nurses before they formally received their state nursing license. And Bryant began that job application process at the beginning of December 1998—almost three months before she ultimately left the hospital.

Finally, ARMC argues that it hired two other African-American applicants for nursing positions in the same general time frame as Bryant's applications. It is true that an employer can attempt to rebut charges of discrimination against an African-American applicant for a promotion by pointing to "other similarly situated African-American employees" who were promoted. *Potomac Elec. Co.*, 312 F.3d at 650. But neither employee relied upon by ARMC here was situated similarly to Bryant. One of the applicants was not hired until several months after Bryant filed charges of racial discrimination with the EEOC. The other applicant was only hired for a part-time position. Neither hiring sufficiently rebuts the inference of discrimination to the point that no reasonable jury could have found in Bryant's favor.

We therefore hold that there was sufficient evidence to support the jury's finding that ARMC unlawfully discriminated against Bryant in refusing to hire her as a nurse. We also hold that the district court did not abuse its discretion in refusing to grant a new trial on this score.

IV.

ARMC also challenges the jury's award of $50,000 in compensatory damages for emotional distress. It argues that there was insufficient evidence to support such an award, and that its motion for new trial *nisi remittitur* should therefore have been granted.

We review for abuse of discretion the district judge's denial of a motion for a new trial based on the alleged excessiveness of the jury's compensatory damage award. *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 280 (4th Cir. 1999). A new trial on damages must be granted if "[1] the verdict is against the clear weight of the evidence, or [2] is based upon evidence which is false, or [3] will result in a miscarriage of justice." *Cline v. Wal-Mart Stores*, 144 F.3d 294, 305 (4th Cir. 1998).

In this case, the evidence presented at trial supported an award of damages for emotional distress. We have held that a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress. *Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir. 1996). Such testimony must "establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated." *Id.* at 1254. The testimony cannot rely on "conclusory statements that the plaintiff suffered emotional distress" or the mere fact that the plaintiff was wronged. *Id.* Rather, it must indicate with specificity "how [the plaintiff's] alleged distress manifested itself." *Id.* The plaintiff must also "show a causal connection between the violation and her emotional distress." *Columbia Colleton Med. Ctr.*, 290 F.3d at 653.

*Appendix A*

Bryant was sufficiently specific about the emotional trauma she suffered as a result of ARMC's actions. She explained that she was "embarrassed, frustrated, and angry," "very disgusted," and that she "didn't feel very good about coming to work." She also testified that this distress inflicted a series of specific physical ailments on her: "frequent headaches, insomnia, irregular menstrual cycles, nausea, [and] vomiting." ARMC argues that we should discount her testimony because she did not seek medical attention for the physical symptoms she was suffering. But Bryant testified that she had always been taught to believe that "anything can be handled through prayer and faith" and to "rely on [her family] for strength." She therefore chose to address "the signs and symptoms of what stress could do to a person" through "prayer and faith" and "through talking with [her] family." That was an understandable way for Bryant to respond to the situation in which she found herself. It is also worth noting, as the district court observed, that Bryant "was herself a medical professional whose opinion as to her own condition the jury was entitled to consider."

We further reject ARMC's suggestion that the degree of Bryant's distress was unreasonable. She was working multiple jobs and trying to better herself by pursuing further education in her field. As ARMC's former director of surgical services testified, Bryant was known even outside ARMC as a capable employee. But in applying for jobs that she qualified for, she was stonewalled for almost one year. Her emotional distress was a reasonable reaction to this mystifying frustration of her professional career.

We also hold that $50,000 was not an excessive amount of compensation for Bryant's emotional distress. The cases cited by ARMC do not convince us otherwise. *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir. 1996), rejected the far greater amount of $500,000 for a plaintiff, "[m]uch if not all" of whose claimed distress was caused by the legally irrelevant and "*erroneous* belief that she was the victim of invidious discrimination." *Id.* at 171 (emphasis added) (remanding for recalculation of damages award). Indeed, *Hetzel* specifically cited a Tenth Circuit case which held that a $50,000 jury verdict could be supported by testimony about emotional distress by a plaintiff and his wife. *Id.* at 172; *See Wulf v. City of Wichita*, 883 F.2d 842, 875 (10th Cir. 1989) (noting that while plaintiff's "testimony and the evidence presented are not the most graphic and detailed display of emotional and mental anguish and distress, we cannot conclude that *some* award for such anguish and distress is unsupported by substantial evidence"). And while *Cline v. Wal-Mart Stores* capped a plaintiff's damages at $10,000, there was no evidence in that case of "physical symptoms of stress, such as depression or loss of sleep." 144 F.3d at 306. Here, Bryant testified quite specifically about precisely such physical symptoms.

For these reasons, we uphold the jury award of $50,000 to Bryant in compensatory damages for emotional distress.

V.

ARMC also contends that the award of punitive damages was a miscarriage of justice and cannot be supported by the facts demonstrated at trial.

The jury's determination of the amount of punitive damages is "not a factual determination about the degree of injury but is, rather, an almost unconstrained judgment or policy choice about the severity of the penalty to be imposed, given the jury's underlying factual determinations about the defendant's conduct." *Atlas Food Sys. and Svcs. v. Crane Nat'l Vendors*, 99 F.3d 587, 594 (4th Cir. 1996). The review of a jury's award of punitive damages is accordingly reviewed "less deferentially than are factual findings." *Id.* at 595. The trial court must compare its own "independent judgment on the appropriate amount with the jury's award to determine whether the jury's award is so excessive as to work an injustice." *Id.* The appellate court then reviews the trial judge's decision in this regard for an abuse of discretion. *Id.*

In this case, we find that the trial judge erred by approving the jury's punitive damages award. 42 U.S.C. § 1981a authorizes punitive damages for Title VII plaintiffs if they can demonstrate that an employer acted "with malice or with reckless indifference to [their] federally protected rights." 42 U.S.C. § 1981a(b)(1) (2003). This standard requires not "a showing of egregious or outrageous discrimination," but rather proof that the employer discriminated "in the face of a perceived risk that its actions will violate federal law." *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 535-36 (1999). The Supreme Court has held, however, that "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's

good faith efforts to comply with Title VII."[4] *Id.* at 545 (citation and internal punctuation omitted).

In contrast to cases where employers "never adopted any anti-discrimination policy [or] provide[d] any training whatsoever on the subject of discrimination," *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 461 (4th Cir. 2002), ARMC had an extensively implemented organization-wide Equal Employment Opportunity Policy. That policy, a version of which was included in the employee handbook, stated that "all persons are entitled to equal employment opportunity regardless of race" and that "it is and shall continue to be our policy to provide promotion and advancement opportunities in a non-discriminatory fashion." ARMC also created a grievance policy encouraging employees to bring forward claims of harassment, discrimination, or general dissatisfaction, and employees were explicitly informed that they would not be retaliated against for making a complaint. There was also a carefully developed diversity training program that included formal training classes and group

4. For an employer to be held vicariously liable for punitive damages, a plaintiff must also show that the discriminating employee served the employer in a managerial capacity and committed the intentional discrimination while acting within the scope of employment. *Lowery v. Circuit City Stores*, 206 F.3d 431, 442 (4th Cir. 2000). In this case, there was sufficient evidence for the jury to find by reasonable inference that the discrimination and retaliation against Bryant involved at least one of the following: the Director of Surgical Services, the Director of Human Resources, and the manager in charge of nurse hiring. There can be no real dispute that these employees qualified as "managerial agents" under *Kolstad*. *See id.; see also Restatement (Second) of Torts* § 909, Illustrations.

exercises for hospital employees. And ARMC voluntarily monitored departmental demographics as part of an ongoing effort to keep the employee base reflective of the pool of potential employees in the area. These widespread anti-discrimination efforts, the existence of which appellee does not dispute, preclude the award of punitive damages in this case. As the Court noted in *Kolstad*, giving protection from punitive damages to "employers who make good-faith efforts to prevent discrimination in the workplace accomplishes Title VII's objective of motivat[ing] employers to detect and deter Title VII violations." 527 U.S. at 545-46 (internal punctuation omitted).[5]

VI.

We affirm the jury's finding of liability as well as its award of compensatory damages. We reverse the award of punitive damages and remand for further proceedings consistent with this opinion.

*AFFIRMED IN PART AND REVERSED IN PART*

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5. On cross-appeal, Bryant also argues that the trial court should have enhanced her award of backpay to offset the higher income tax burden she will incur because of receiving that amount in one lump sum. The trial court has "broad equitable discretion to fashion remedies to make the plaintiff whole for injuries resulting from a violation" of Title VII. *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 356 (4th Cir. 1994). We review its decision to deny such equitable relief only for an abuse of discretion, *id.*, and we hold that the district court did not abuse its discretion in denying Bryant's motion.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AIKEN DIVISION FILED JUNE 6, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

C.A. No. 1:00-1224-22

WANDA M. BRYANT,

Plaintiff,

v.

AIKEN REGIONAL MEDICAL CENTERS, INC.,

Defendant.

### ORDER ON DAMAGES

This matter is before the court for post-trial review of damages awarded by the jury and for the court's determination of certain related damages issues. For the reasons set forth below, this court:

1. confirms its award of $40,000 in back pay damages;

2. rejects Defendant's challenge to the jury's assessment of $50,000 in compensatory damages for emotional distress injuries;

3. rejects Defendant's challenge to the propriety and amount of the punitive damages award ($210,000);

4. awards Plaintiff prejudgment interest based on South Carolina's statutory rate of interest 8.75% ($7,710.05 through June 4, 2002, plus $9.62 per day through the date of entry of judgment);

5. rejects Plaintiff's request for an enhancement to account for the income tax consequences of the lump-sum back pay award.

**Background**

This matter came before the court for trial on March 18, 2002. Trial continued through March 20, 2002, at which time the jury returned a verdict on special interrogatories finding that Defendant had "denied [Plaintiff] a promotion to a registered nurse position because of racial discrimination" and had declined to promote her "to surgical tech[nician] in April 1998 based on retaliation" for prior protected conduct. Verdict Form Questions 2 & 3; Supplemental Verdict Form. The jury awarded Plaintiff "compensatory damages for emotional pain, humiliation, and mental anguish in the amount of $50,000.00," and assessed punitive damages in the amount of $210,000. Verdict Form Questions 5 & 6. In addition, the jury provided an advisory verdict as to compensatory damages for lost wages and benefits in the amount of $40,000. After careful consideration of the evidence, this court adopted the advisory verdict on back pay as its own.

*Appendix B*

At the close of trial, Plaintiff moved for prejudgment interest and an enhancement to compensate Plaintiff for the tax consequences of receiving her back pay in a single lump-sum award. The court allowed further briefing on this and related damages issues. Those issues have now been fully briefed.

**Discussion**

**1. Back Pay Award – $40,000**

The evidence supporting an award of back pay in the amount of $40,000 was discussed in detail at the conclusion of the trial. *See* Tr. at 50-57. In fact, in order to insure that the court had a complete basis for properly calculating damages, the court presented the jury with a supplemental special verdict question and sent them back for further deliberations. *See* Tr. at 47-50 & 54.

Based on the calculations discussed in the above referenced pages of the transcript, this court first concluded that the jury's advisory verdict of $40,000 was supported by the record. It then determined, based on the same evidence and calculations, to adopt this verdict as its own. While Defendant points this court to other evidence which could have resulted in a lower back pay award, Defendant has not convinced this court that its earlier findings were incorrect or that the back pay award should be reduced. This court, therefore, reaffirms its finding that $40,000 is the proper amount of back pay necessary to compensate Plaintiff for lost wages and benefits.

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**2. Compensatory Damages for Emotional Distress – $50,000**

The jury concluded that Defendant's first actionable conduct was its refusal to promote Plaintiff to a surgical technician position in April 1998, in retaliation for Plaintiff's prior protected activities. Despite the denial of promotion, Plaintiff continued to work for Defendant from that date until February 1999. During this time, Plaintiff obtained her degree and license as a Registered Nurse. During the late fall of 1998, Plaintiff began seeking a position as an RN to commence upon receipt of her degree (December 1998) and license (January 1999). Plaintiff left Defendant's employ in February 1999, after receiving little or no response to her attempts to obtain a position as an RN. The jury concluded that this lack of response and the resulting denial of a nursing position was based on race discrimination or retaliation or both.

Plaintiff testified that her emotional reaction to the discrimination and retaliation was to feel "embarrassed, frustrated, and angry." Tr. Vol. I at 155. She also testified that her resulting emotional distress manifested itself in the following physical symptoms: "frequent headaches, insomnia, irregular menstrual cycles, nausea, [and] vomiting." *Id.*

Based on this and other record evidence, the jury could reasonably have concluded that Plaintiff was placed in an emotionally trying situation which continued at least from mid April 1998 through the conclusion of her employment in early 1999. The jury could also reasonably have found

that the distress was exacerbated by the various inconsistencies in Defendant's position. For example, there was substantial evidence that Plaintiff made multiple attempts to gain both types of position and that her attempts were met either with conflicting or deprecating responses.[1]

The jury could have reasonably concluded that these mixed or negative messages gave Plaintiff good cause to believe that Defendant would never allow her to advance, despite the fact that Defendant had advanced tuition money to Plaintiff under an agreement that required Plaintiff to repay the money if she did not remain in Defendant's employ. It was not until the very conclusion of Plaintiff's employment that Defendant affirmatively released Plaintiff from this obligation. Even then it did so based on an alleged inability to find a signed document, which could have caused Plaintiff to worry that Defendant might change its position if it later

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1. Plaintiff testified, for instance, that when she complained to three different managers (John Morkavich, Ron Parks, and Sandy Garcia) regarding her failure to receive a promotion to a surgical technician position, they told her "that they did not want to hire me right then as a surgical technician because I was going to be graduating from nursing school in a few months and they were going to give me a job as an operating room nurse." Tr. Vol. I at 113. Nonetheless, Plaintiff's attempts to gain such a position were equally unsatisfactory. *See* Tr. Vol. I at 115-18, 126-34 & 186. Most particularly, when she spoke to nursing supervisor Ann Angle in January or February of 1999, to whom she was directed by Human Resources when she complained of the lack of response to her applications for a nursing position, Angle indicated that there was nothing wrong with Plaintiff staying in her current low paying, sub-surgical technician position despite receipt of a nursing degree. *See infra* at 8 (discussing comments of Ann Angle).

found a signed document.[2] The jury could, therefore, reasonably have concluded that Plaintiff was placed in a position for much of the last year of her employment with Defendant which left her feeling not only upset by the discrimination and retaliation but also trapped by the tuition agreement.

Plaintiff's distress was not, however, necessarily limited to the nearly ten month period of time between the first retaliation and her departure from Defendant's employ. Rather, the jury could quite reasonably have assumed that Plaintiff's distress continued into the subsequent months during which Plaintiff worked for other institutions as an RN for less than she would have received at Defendant's hospital.

In short, while Plaintiff may not have demonstrated that her emotional distress rose to such a level that she sought medical attention, the duration of the period for which the jury could reasonably find distress and Plaintiff's testimony regarding her emotional and physical reactions to the distress support the amount of the award. *See Johnson v. Hugo's Skateway,* 974 F.2d 1408 (4th Cir. 1992) (upholding an award of $25,000 in compensatory damages for emotional distress for a single incident occurring over the course of one evening).[3] Further, as to the issue of medical attention,

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2. Such a fear would not be wholly unreasonable as Defendant has, in documents filed with this court, suggested that Plaintiff tried to evade her obligations under this agreement when the evidence is to the contrary: that Plaintiff brought the obligation to Defendant's attention.

3. The defendants in *Johnson* included both a skating rink (Hugo's) and a deputy sheriff. Hugo's was held liable for harassing

(Cont'd)

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Plaintiff was herself a medical professional whose opinion as to her own condition the jury was entitled to consider. Thus, this court concludes that Plaintiff's testimony as to the extent and form of her emotional distress injuries was "demonstrable, genuine, and adequately explained." *Price v. City of Charlotte,* 93 F.3d 1241,1252 (4th Cir. 1996).

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(Cont'd)

plaintiff due to his race. The deputy was held liable for excessive force in arresting plaintiff when called by Hugo's. The deputy was not, however, held to have committed any race based tort. The jury awarded $200 against the deputy for his actions and $25,000 against Hugo's. Hugo's challenged the award based, in part, on the disparity of the amounts awarded relative to the actions of the two defendants.

The specific actions which Hugo's directed towards plaintiff consisted of a manager asking plaintiff, the only African-American in the rink, to accompany the manager to a back room and then calling the sheriff to remove plaintiff when he refused to accompany the manager to the back room. During the intervening thirty minutes, plaintiff sat in front of the manager's office. As the court directed a verdict against plaintiff on any false arrest or false imprisonment claim, these are the sole actions from which any injuries chargeable to Hugo's rink could have flowed.

The only specific evidence of the emotional harm discussed in the appellate opinion is plaintiff's testimony that the request from the manager, who was described as "elderly," made plaintiff feel threatened and intimidated. The Fourth Circuit concluded that: "Because of the difficulty in measuring the amount appropriate to compensate for the emotional injuries resulting from these sorts of wrongs and the rational basis for distinguishing between the harm caused by [the deputy] and that caused by Hugo's, we cannot conclude that the award against Hugo's was excessive." 944 F.2d at 1414.

For these reasons, this court concludes that the jury's award of compensatory damages in the amount of $50,000.00 for emotional distress was supported by the evidence.

**3. Punitive Damages – $210,000**

Defendant's challenges to the punitive damages award fall into two categories. First, Defendant challenges the adequacy of the evidence to support the award of punitive damages under Title VII's statutory language and interpretative case law. Second, Defendant challenges the amount of the award under constitutional due process standards. This court has, therefore, conducted a careful review of the punitive damage award in both respects. *See Cooper Industries v. Leatherman Tool Group,* 532 U.S. 424 (2002) (directing appellate courts to conduct de novo review of trial court awards of punitive damages where constitutional challenges are raised and reaffirming standards established in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996) for trial court's review of punitive damages awards).

This court gave the jury a full instruction on the standards the jury should apply and factors they should consider in deciding whether to award punitive damages, including: whether a management official personally acted with malice or reckless indifference to Plaintiff's federally protected rights; and whether Defendant made good faith efforts to comply with the law. *See* Defendant's memorandum filed April 3, 2002 at 7-9 (quoting Tr. Vol. III at 21-23). There was no objection made to this charge at the time or now, beyond Defendant's argument that the issue should not have

been submitted to the jury and, thus, no charge given. Rather, Defendant challenges the adequacy of the evidence to support findings against it under the standards as charged.

Defendant first argues that the evidence is insufficient to support a finding of malice or reckless indifference. *See Kolstad v. American Dental Ass'n,* 527 U.S. 526, 535 (1999) (these terms refer to "the employer's knowledge that it may be acting in violation of federal law"). Defendant's argument on this point merges with its second argument as both are based on the existence and dissemination of Defendant's written policy against discrimination. *See Kolstad,* 527 U.S. at 545 (punitive damages are not appropriate against the employer where the discriminatory action was "contrary to the employer's good-faith efforts to comply with Title VII").

The evidence is, however, more than sufficient to support the conclusion that any written policy was not implemented in good faith and that the discriminatory and retaliatory actions directed towards Plaintiff were sufficiently widespread among multiple persons with managerial and administrative responsibilities to treat those acts as the intentional actions of the employer. *See Harris v. L & L Wings, Inc.,* 132 F.3d 978 (4th Cir. 1997) (finding supervisors' repeated failure to address plaintiffs' concerns was evidence of employer's indifference to plaintiffs federally protected rights). Much of this evidence is addressed in Plaintiff's memorandum, as well as this court's order on Defendant's motion for summary judgment, and will not be fully repeated here. This court will, however, point to a few specific areas of supporting evidence.

*Appendix B*

First, Plaintiff's testimony regarding her difficulties in gaining the positions at issue involved a number of management level employees including Richard Lowe, the person who was responsible for enforcement of the policy during the relevant period.[4] As discussed below, the direct actions of Lowe himself, as reported by Plaintiff, could be interpreted as showing reckless indifference or actual malice, including evidence sufficient to support the conclusion that Lowe was involved in a concerted effort to deny Plaintiff any advancement opportunities and to encourage her to leave Defendant's employ. Given the jury concluded that Plaintiff was denied the promotions for racially discriminatory or retaliatory reasons, it follows that the jury could reasonably have concluded that any concerted effort was so motivated

Plaintiff testified that she spoke with Lowe and other individuals in the Human Resources Department four and six times regarding her difficulties obtaining responses to her applications for an RN position.[5] Tr. Vol. I at 126. When Plaintiff first went to Lowe regarding her difficulties receiving responses to her applications for a nursing position,

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4. Lowe was the Director of Human Resources at the time Plaintiff resigned. Tr. Vol. I at 118.

5. Plaintiff testified that she applied for four different nursing positions and received only one interview. Tr. Vol. I at 131. The hiring nurse did not attend that interview, but sent two other nurses who indicated that the hiring nurse would be back in touch with Plaintiff. Tr. Vol. I at 132. Plaintiff never received any subsequent contact from the hiring nurse. *Id.* Another nurse manager also promised to contact Plaintiff regarding the availability of a different nursing position but, likewise, failed to follow up. Tr. Vol. I at 133-34.

and her concerns regarding her obligations under an agreement under which tuition money was advanced to aid her in completing her nursing degree, Lowe referred Plaintiff to another individual named Mary Ann Angle who was, apparently, in charge of nurse hiring. Tr. Vol. I at 119. It required three contacts with Angle before Angle would sit down with Plaintiff to discuss Plaintiff's concerns. Tr. Vol. I at 128. It was at that point that Angle told Plaintiff she saw no problem with Plaintiff continuing in a central services position despite the fact that Plaintiff had, by this time, acquired a nursing degree and license. Tr. Vol. I at 128-29. Such a comment might reasonably be taken as an indication that Defendant had no intention of allowing Plaintiff to advance.

By this point in time, Plaintiff's immediate supervisor had given Plaintiff an unsolicited glowing letter of recommendation. Tr. Vol. I at 134-35. Plaintiff also testified that this same supervisor had been critical of her performance, to the point of being "nitpicking," ever since Plaintiff voiced complaints about the racial composition of the surgical technician class. This change in attitude and the unsolicited nature of the letter of recommendation is subject to widely divergent interpretations. One reasonable interpretation, particularly when combined with the other evidence addressed above, is that Defendant wanted to encourage Plaintiff to leave because it viewed her as undesirable or a trouble maker. This is in part because there would have been no need for such a letter to support Plaintiff's promotion within Defendant's employ given Defendant's internal hiring and promotion procedures.

*Appendix B*

After meeting with Angle, Plaintiff determined that she would likely need to seek employment elsewhere. She returned to Lowe to advise him of Angle's comments and to again discuss her obligations under the tuition agreement. Tr. Vol. I. at 129. Lowe, apparently, did not indicate any concern with Angle's comments. Lowe did not immediately address the tuition agreement as he was not familiar with it. He subsequently sent Plaintiff a letter stating that Plaintiff was not obligated under the tuition agreement because it had not been signed by anyone in the hospital. *Id.* In the interim, Plaintiff had submitted her letter of resignation giving two weeks notice.

The actions of Lowe and the Human Resources Department also raise concerns because, according to Plaintiff, no one in that department ever advised Plaintiff of any concerns with the form or timing of her applications, or any of the other matters on which Defendant relied at trial. Tr. Vol. I at 119 & 126-27 (Plaintiff on direct). Defendant, however, sought to defend its failure to offer Plaintiff any position (or to respond to her applications) by suggesting that the applications were submitted improperly, too early, or not at all. *E.g.*, Tr. Vol. I at 168-69 (Plaintiff cross-examination).

The jury concluded that Plaintiff did not receive the nursing positions for which she applied either due to racial discrimination or retaliation or both. Given the record as to Lowe's and other managers' involvement, the jury could well have concluded that the employer, through its various managers, was not only not implementing a

nondiscrimination policy in good faith, but was actively discriminating in a concerted, widespread manner, despite the existence of a written policy.

There is a similar record to support the conclusion that multiple management level employees were involved in earlier denials of Plaintiff's attempt to advance to a surgical technician position. Plaintiff testified that, in or before April 1998, she spoke with both her direct supervisor, John Morkavich, and Thomas Kelly, the Service Excellence Coordinator, regarding the lack of response to her prior applications for a surgical technician position, suggesting that she felt the only difference between herself and the person she knew who had received such a position was their race. Tr. Vol. I at 106-07. At that time, according to Plaintiff, Kelly advised Plaintiff that addressing race discrimination complaints was part of his job. Tr. Vol. I at 108. Despite these conversations, Plaintiff received no direct response to her April 1998 application for a surgical technician position. Plaintiff also testified that the work atmosphere became hostile and "nitpicking" thereafter. Tr. Vol. I at 109.

Plaintiff also testified that she complained to Morkavich, Ron Parks, and Sandy Garcia (who was in charge of the surgical technicians), regarding the lack of African Americans in the surgical technician training program, which comment apparently included a statement of concern that Plaintiff personally had been denied an opportunity for promotion to surgical technician. Tr. Vol. I at 112. The response Plaintiff was given by one or more of these individuals was that they did not want to promote Plaintiff to Surgical Technician at

that time because they intended to hire her as a surgical nurse when she completed her nursing training in the next few months. *Supra* note 1.

While not all of the above referenced persons may have been involved in the final decisions to deny the relevant promotions, a reasonable inference can be drawn from the evidence that a number of these individuals took actions which contributed to Plaintiff's loss of opportunity to obtain the promotions, and, at the least, that they acted with complete indifference towards her concerns. In fact, it is clear that the jury concluded Plaintiff was denied the promotion she sought through her April 1998 application in retaliation for her complaints of racial discrimination.

In short, the inferences to be drawn from the evidence suggest sufficiently widespread problems that the jury could have concluded that any written policy was not implemented in good faith. They may also have concluded that the managers to whom Plaintiff turned for assistance were, at the least, recklessly indifferent to her concerns and, quite possibly, in active concert in denying her any opportunity for advancement. Thus, there is evidence of malice and reckless indifference to Plaintiff's federally protected rights which is chargeable to the employer. Under these circumstances, this court finds the punitive damage award to be well supported by the evidence.

In light of this evidence, it is also clear that the award does not offend due process. *See Leatherman,* 532 U.S. 424, 440 (2002) (reaffirming use of three *Gore* factors in reviewing punitive damage award: (1) reprehensibility of the wrongful

conduct; (2) reasonable ratio of compensatory to punitive damages; and (3) comparability of other awards). First, as discussed above, there is evidence of widespread and even collaborative efforts to deny Plaintiff's federally protected rights. Such behavior is clearly reprehensible. Second, the ratio of compensatory damages to punitive damages is clearly reasonable (a little more than two to one). Finally, given that the award is well below the statutory cap on such damages, this court does not find the comparability factor to raise a concern. *See Harris,* 132 F.3d 978 (affirming punitive damage award of $150,000 each to two plaintiffs who were harassed over a period of time).

**4. Prejudgment Interest – $7,710.05 through June 4, 2002**

The award of prejudgment interest has generally been accepted as a proper means of insuring that back pay awards fully compensate plaintiffs who advance successful claims under Title VII. *See Loeffler v. Frank,* 486 U.S. 549, 557-58 (1988) ("apparently all of the United States Courts of Appeals that have considered the question agree, that Title VII authorizes prejudgment interest as part of the backpay remedy in suits against private employers. This conclusion surely is correct."). Under Fourth Circuit precedent, whether or not to award interest is within the discretion of the trial court. *Maksymchuk v. Frank,* 987 F.2d 1072,1077 (4th Cir. 1993) (noting courts should be guided in the exercise of that discretion by the goal of making plaintiffs whole for their losses).

*Appendix B*

The district court is also given broad discretion as to the rate to use in calculating prejudgment interest because there is no prescribed federal rate. *EEOC v. Liggett & Myers, Inc.*, 690 F.2d 1072, 1074 (4th Cir. 1982). Both the Fourth Circuit and other judges within this district have relied on the state statutory rate as a valid rate for prejudgment interest in actions involving federal claims. *See Liggett & Myers*, 609 F.2d at 1074 (approving rate of prejudgment interest set by state statute); *Sadighi v. Daghighfekr*, 66 F. Supp. 2d 752, 765 (D.S.C. 1999) (applying rate set by S.C. Code Ann. § 34-31-20(A) in action involving both state and federal claims).

Defendant's only proffered argument against an award of prejudgment interest is based on an Eighth Circuit case which upheld the district court's denial of prejudgment interest based on the fact that plaintiff had also received a generous front-pay award. *See MacDissi v. Yalmont Indus. Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988). This does little to instruct this court as to how it should exercise its discretion in a case when there is no front-pay award. Moreover, Defendant's argument strikes this court as inconsistent with the guidance given in *Maksymchuk*, including as to the limited circumstances under which back pay is generally denied. *See Maksymchuk*, 987 F.2d at 1077 ("Prejudgment interest is commonly denied when the back pay award is not readily determinable or when the plaintiff fails to raise the issue in a timely or in an appropriate manner").

This court concludes that prejudgment interest is necessary in the present case to make Plaintiff whole for her losses. It further concludes that interest should be at the state's

statutory rate of 8.75 %. *See* S.C. Code Ann. § 34-31-20(A). This court, therefore, awards Plaintiff prejudgment interest of 8.75 % ($7,710.05 through June 4, 2002, plus $9.62 per day through the date of entry of judgment).

**5. Enhancement of Award for Income Tax Consequences**

Plaintiff also argues for an enhancement to compensate her for the tax consequences of receiving her back pay in a lump-sum award. While Plaintiff cites some supporting authority, it does not appear that the Fourth Circuit has yet approved use of such an enhancement. Further, in the present case, Plaintiff has received both significant emotional distress and punitive damages awards which provide additional damages beyond the back pay award. Under these circumstances, this court is not inclined to apply what is a novel theory in this circuit to enhance the back pay award.

**CONCLUSION**

For the reasons set forth above, this court confirms its initial award of back pay in the amount of $40,000.00, and awards prejudgment interest in the amount of $7,710.05 through June 4, 2002, plus $9.62 per day through the date of entry of judgment. The court declines to further enhance the back pay award to compensate for tax consequences of receipt of the award in a lump-sum. The court further finds the jury's awards of $50,000.00 in compensatory damages for emotional distress as well as $210,000.00 in punitive damages to be well supported by the evidence and law. Judgment shall be entered accordingly.

*Appendix B*

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
June 5, 2002

**APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED JULY 22, 2003**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-2147
CA-00-1224-22BC

WANDA M BRYANT, individually and as class representative on behalf of all persons similarly situated

Plaintiff - Appellee

v.

AIKEN REGIONAL MEDICAL CENTERS INCORPORATED

Defendant - Appellant

No. 02-2192
CA-00-1224-22BC

WANDA M BRYANT, individually and as class representative on behalf of all persons similarly situated

Plaintiff - Appellant

v.

AIKEN REGIONAL MEDICAL CENTERS INCORPORATED

Defendant - Appellee

*Appendix C*

On Petition for Rehearing and Rehearing En Banc

The appellee/cross-appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

No. 03-587

Supreme Court, U.S.
FILED
DEC 19 2003
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

WANDA M. BRYANT,

*Petitioner*,

*v.*

AIKEN REGIONAL MEDICAL CENTERS, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Whether this Court should exercise its discretion to review the decision of the Fourth Circuit when there is no split in the Circuits with regard to the application of this Court's *Kolstad* decision and standards set forth therein.

Whether this Court should exercise its discretion to review the Fourth Circuit's decision that, as a matter of law, Respondent met the good faith defense standards set forth in *Kolstad*.

Whether this Court should exercise its discretion to review the fact-specific decision that Petitioner's failure to dispute Respondent's nondiscrimination efforts allows it to now argue a new theory of "alter ego" not properly raised or preserved below.

Whether this Court should exercise its discretion to review the decision of the Fourth Circuit when there is no split in the Circuits with regard to the tax enhancement issue.

Whether this Court should exercise its discretion to review the decision of the Fourth Circuit when the issue is not preserved for appeal.

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Aiken Regional Medical Centers, Inc., is owned by a subsidiary of Universal Health Services, Inc., which is publicly traded.

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## STATEMENT OF THE CASE

This race discrimination case arises from a dispute between Petitioner and Respondent over the failure to promote/hire Petitioner. The case went to the jury on three claims, and the jury found for Petitioner on two claims, to-wit: that the Respondent (Hospital) improperly refused to hire Petitioner as a registered nurse and that the Hospital had retaliated against her. The jury awarded actual and punitive damages.

The trial court denied the Hospital's motion to strike the punitive damages award. The trial court also denied the Petitioner's motion for a "tax enhancement" of her back-pay award. Both parties appealed. The Fourth Circuit affirmed the trial court in all respects except to reverse the award of punitive damages against the Hospital.

The Hospital hired Petitioner in April 1994 as a technician in its Central Services Department. During her employment, from the Fall of 1996 through the Fall of 1998, Petitioner simultaneously attended the University of South Carolina-Aiken to pursue a nursing degree. The Hospital paid approximately $5,000.00 of her tuition to assist her in receiving that degree.

During January 1999, prior to the receipt of her nursing license, Petitioner asked the Hospital's Human Resources Director whether she was free to seek employment at other hospitals, or whether she must continue working for the Hospital based on a tuition contract. The Human Resources Director told her to discuss registered nurse opportunities with the Hospital's Director of Nursing. The Human Resources Director investigated the contract matter and

determined there was no binding tuition agreement between the parties, because there was no signed agreement. He told Petitioner she was free to seek employment with other hospitals. It is undisputed Petitioner did not mention any race discrimination to the Human Resources Director at this or any other time.

On February 8, 1999, Petitioner submitted her two-week notice of resignation, effective February 22, 1999.[1] She had accepted a nursing position with another hospital based on applications that she had submitted prior to her resignation. She did not mention race discrimination, retaliation, or any other employment problem in her letter of resignation. She observed "I appreciate the experiences and knowledge I gained as an employee in Central Services and wish you a successful future." A note in Petitioner's personnel file stated she was eligible for rehire after her voluntary resignation.

The Hospital's Equal Employment Opportunity Policy stated in pertinent part:

> It is and shall continue to be the policy of Aiken Regional Medical Centers that all persons are entitled to equal employment opportunity regardless of race . . .
>
> In compliance with the provisions of all applicable State and Federal civil rights laws, every effort will be made to employ the most qualified individuals without regard to the above factors. Additionally, it is and shall continue to be our

1. Since there was no tuition agreement, the Hospital did not seek reimbursement of its tuition payments when Petitioner voluntarily resigned on February 8, 1999.

> policy to provide promotion and advancement opportunities in a non-discriminatory fashion.
>
> . . .

It is undisputed that this was the Hospital's Policy throughout Petitioner's employment. It is undisputed that the Hospital advised all employees of this Policy in its employee handbook, policy manual, and job applications. The Hospital trained its employees on the requirements of the Policy and informed all employees that it would not retaliate against them for complaining about or grieving any employee relations issues, such as dissatisfaction, harassment, or discrimination.

The Hospital's Policy encouraged employees to report discrimination to the "Director of Human Resources or the Hospital Administrator." Petitioner never did this. The Hospital's "Problem Solving Procedure" encouraged employees to discuss problems with the "Department Head or Administration" and/or the "immediate supervisor" or the "supervisor's manager." Petitioner never did this.

In furtherance of its Policy, the Hospital implemented a "diversity or race relations program" to develop diversity training classes and exercises to re-train and re-educate employees, even though the Hospital did not perceive diversity and/or race relations to be a problem. In addition, the Hospital voluntarily monitored its hiring practices and termination records to determine whether "anomalies" existed in "departmental demographics."

Petitioner discussed the Hospital's hiring practices with three people: (1) Thomas Kelly, an African-American who

served in a non-managerial role as Service Excellence Coordinator; (2) Ron Park, the Surgical Educator; and (3) Sandy Garcia, the Surgical Services Director.[2] Petitioner admitted Mr. Kelly was not a manager and had no hiring or promotion authority. Mr. Park likewise was not a manager and had no hiring authority. There is no evidence that Petitioner complained of race discrimination to Mr. Park or Ms. Garcia. Petitioner admitted she never specifically raised the race discrimination issue with any manager.

In short, the only evidence of any race-based complaint was that Petitioner complained to Mr. Kelly, but it is undisputed he had no managerial or hiring authority. There is no evidence whatsoever that any decision maker or manager was aware of Petitioner's race discrimination complaint to Mr. Kelly, or of any race-based concern she might have had.

During the time period that Petitioner sought a nursing position, the Hospital hired four nurses. Two of the nurses were African-American females and one was otherwise similarly situated to Petitioner, to-wit: she was a current employee enrolled in the same nursing school and receiving tuition aid from the Hospital. The undisputed evidence was that these four nurses were hired between the date Petitioner received her license and her effective date of resignation. The undisputed evidence also shows that the Hospital had a history of hiring African American nurses both during and after Petitioner's employment.

---

2. Petitioner never discussed available nursing positions with Ms. Garcia, and Ms. Garcia was unaware that Petitioner had applied for a nursing position.

## SUMMARY OF THE ARGUMENTS

**The Punitive Damages Issue:** The Fourth Circuit's decision raises no constitutional issue nor does it create a split among the circuits. The trial court conducted a *de novo* review of the punitive damages issue, and the Fourth Circuit reviewed the trial court's ruling. The Fourth Circuit did not substitute its own view of the evidence for that of the jury. Instead the Fourth Circuit properly reviewed the trial court's *de novo* analysis under the standards set forth in *Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

Petitioner asks this Court to adopt a bright line test for punitive damages when the Supreme Court in *Kolstad* has indicated there should be none. Like the Fourth Circuit, the other Circuit Courts have universally applied the *Kolstad* standards for punitive damages to the facts before them, requiring proof that "the employer has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual" but further noting that an employer is not liable for punitive damages if the discriminatory actions of managerial agents were contrary to the employer's "good faith efforts to comply with Title VII." *Kolstad*, 527 U.S. at 545.

Petitioner's "alter ego" theory of liability under *Kolstad* is raised for the first time in the petition to this Court and, therefore, is not properly preserved for review. It is also without merit, because it seeks a bright line test based on job title without consideration of the employer's undisputed organizational good faith efforts to comply with Title VII.

**The Tax Enhancment Issue:** The Fourth Circuit's decision does not create a split in the circuits; Petitioner's position is based on opinions from district courts. The tax enhancement argument also does not create any constitutional issue. Moreover, any such issue is not properly preserved for review, because it was not timely and properly raised to the district court at trial.

## I. THIS COURT SHOULD DENY CERTIORARI ON THE PUNITIVE DAMAGES ISSUE.

### A. *The Fourth Circuit properly applied Kolstad.*

This Court in *Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999), articulated the following standard for punitive damages:

> The statute's 'primary objective' is a 'prophylactic one; it aims chiefly, 'not to provide redress but to avoid harm.'
>
> . . .
>
> In light of the perverse incentives that the Reinstatement's 'scope of employment' rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII . . . Recognizing Title VII as an effort to promote prevention as well as remediation and observing the very principles underlying the Reinstatements' strict limits on vicarious liability for punitive damages, we agree that, *in the punitive damages context*, an employer may not be vicariously liable for the discriminatory decisions of managerial agents

> where the decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'

*Kolstad* at 545 (emphasis added) (citations omitted).

Here, the Fourth Circuit carefully noted that it was reviewing "the trial judge's decision" and the trial court's independent judgment rather than the jury's determination.

The Fourth Circuit's opinion is consistent with, not contrary to or opposite, other Circuits' review of punitive damages awards. *Fitzgerald v. Mountain States Telephone and Telegraph Co.*, 68 F.3d 1257, 1262 (10th Cir. 1995) (whether sufficient evidence exists to support punitive damages is a question of law); *Romano v. U-Haul Int'l*, 233 F.3d 655, 673 (1st Cir. 2000) (reviewing court engaged in determining or making an excessiveness inquiry should accord 'substantial deference to the legislative judgments concerning appropriate sanctions for the conduct at issue); *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376, 385 (2d Cir. 2001) (Kolstad good faith defenses discussed in terms of "as a matter of law"); *Hall v. Consolidated Freightways Corp.*, 337 F.3d 669 (6th Cir. 2003) (addresses whether issue of punitive damages was properly submitted to the jury, not the appellate court's review of the trial judge's *de novo* review of the punitive damages issue); *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478 (7th Cir. 2003) (no discussion of an Appeal court's review of a trial court's *de novo* review of punitive damages); *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000) (discusses company's efforts "as a matter of law" applying the *Kolstad* standards); *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001) (due process challenge to the punitive damages award reviewed under *de novo* standard).

The Fourth Circuit noted, consistent with the trial court's analysis, that the Hospital had created and implemented the following policies or procedures:

1. an extensively implemented, organization-wide Equal Employment Opportunity Policy;

2. inclusion of the policy in the widely distributed employee handbook, setting forth the prohibition of race discrimination to include non-discrimination in promotions;

3. creation of a grievance procedure encouraging employees to submit claims of harassment, discrimination, or general dissatisfaction;

4. explicitly informing employees there would be no retaliation for making a complaint;

5. adoption of a carefully developed diversity training program that included formal training classes and group training exercises for hospital employees; and

6. voluntarily monitoring department demographics to keep the employee base reflective of the pool of potential employees in the area.

The Hospital's implementation of these policies is best seen in the hiring of employees similarly situated to Petitioner at the time she complains of racial discrimination and other hiring patterns at the Hospital. Other than inferences and Petitioner's "gut" feel that there was discrimination, there is

no evidence in the record to counter each of these substantial organizational efforts to provide equal employment opportunities in the workplace. In fact, there was no evidence – corroborating witness, smoking gun document, or any document – to challenge, contradict, or otherwise suggest that the Hospital's non-discrimination efforts were anything other than in good faith and implemented by its managers including the Human Resources Director. Thus, consistent with the "good faith" defense announced by this Court in *Kolstad*, the Fourth Circuit reversed the award of punitive damages.

### B. *Petitioner's "alter ego" argument is not preserved and has no merit.*

To overcome the Fourth Circuit's "good faith" ruling, Petitioner argues the so-called "alter ego" exception to the defense. Petitioner did not make this argument to the Fourth Circuit; she raises it for the first time in the petition to this Court. Thus, it is not properly before this Court for review and affords no basis for certiorari. Moreover, it is without merit.

Petitioner confuses inferences from evidence with evidence that is undisputed. Both the District Court and the Fourth Circuit identified many efforts the Hospital undertook to notify employees and thereafter insure equal employment opportunities in the workplace. As the Fourth Circuit noted in its Order, Petitioner did not dispute these widespread nondiscrimination efforts. The undisputed evidence further reveals that the Human Resource Director implemented several of these nondiscrimination programs. In addition, at no time was the Human Resource Director directly or

indirectly informed of Petitioner's discrimination claims. Finally, as implemented, the organizational nondiscrimination programs and/or policies resulted in the hiring of African Americans. Said another way the organization's efforts achieved the "prophylactic" objective of the statute.

## II. THE COURT SHOULD DENY CERTIORARI ON THE TAX ENHANCEMENT ISSUE.

### A. *This issue is not properly before this Court.*

Petitioner never raised this issue before or during trial. She raised it for the first time in an oral motion after the jury's verdict, followed by a written motion with an attached expert affidavit. This was an untimely and cavalier disregard for the provisions of the scheduling order, especially with respect to the timelines for identifying experts. It also deprived the Hospital of any opportunity to depose or cross-examine Petitioner's expert and to engage its own expert to refute or counter Petitioner's expert. In short, this issue is not properly preserved for appeal and, therefore, affords no basis for certiorari.

### B. *The Fourth Circuit properly affirmed the trial court's denial of a tax enhancement.*

The Fourth Circuit correctly denied Petitioner's request for a tax enhancement, as courts do not compensate a plaintiff for any tax consequences that she might suffer as a result of an award in a typical, non-class discrimination case. *See Sears v. The Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (allowing a tax component in a back pay award for a class of plaintiffs covering a seventeen year period but noting that a "tax component may not be

appropriate in a typical Title VII case.") (citing *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1480 (10th Cir. 1984) for the proposition that a tax component was inappropriate in an age discrimination case); *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987) (vacating and remanding tax enhancement award); *see generally Curl v. Reavis*, 608 F. Supp. 1265, 1269 (W.D.N.C. 1985) (noting that the "Plaintiff's tax liability is a matter between the Plaintiff and the respective taxing authority.").

Title VII adopted its "make-whole back pay," remedial scheme from the National Labor Relations Act at the time of its enactment in 1964. Thirty-nine years after the passage of Title VII, no Circuit Court has affirmed or decided in an individual treatment case that back pay should be afforded tax enhancement as part of the relief granted. The Fourth Circuit, therefore, properly decided the issue and no review is merited.

### C. *The Fourth Circuit's decision does not create a split in Circuits on the questions of a tax enhancement award.*

There can be no split in the Circuits on the question of a tax enhancement award when no Circuit has affirmed or issued an opinion awarding this relief in a disparate treatment case. *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1480 (10th Cir. 1984) (tax component was inappropriate in an age discrimination case); *Sears v. The Atchison, Topeka & Santa Fe Ry.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (tax component likely inappropriate in a typical Title VII case, but did award in a class action case covering seventeen years); *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987) (vacates and

remands tax enhancement award). The Fourth Circuit was, therefore, consistent in its refusal to award tax enhancement in this disparate treatment case, and properly affirmed the District Court's decision denying the enhancement.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
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No. 03-587

IN THE

# Supreme Court of the United States

WANDA M. BRYANT,

*Petitioner*,

*v.*

AIKEN REGIONAL MEDICAL CENTERS, INC.,

*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## REPLY BRIEF

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## ARGUMENTS IN REPLY FOR GRANTING WRIT

### I. There Is A Conflict Among The Circuits About The Appropriate Level Of Deference To Be Afforded To Jury Determinations Of Liability For Punitive Damages.

The parties in this case agree about what happened below: the Fourth Circuit decided, as a matter of law from its own review of the record, that Defendant established the good-faith defense to punitive damages recognized by this Court in *Kolstad*. What the parties disagree about is whether the application of the *Kolstad* standard, where the facts and inferences are hotly disputed at trial, should be made by the jury or by the appellate court. The parties also disagree sharply about how other circuits have treated this issue. With all due respect, the Fourth Circuit's holding that the jury's determination in this regard is not entitled to any deference is contrary to other circuits that have afforded such jury findings their proper regard. The approach of the Fourth Circuit below is also contrary to the Re-examination Clause of the Seventh Amendment to the United States Constitution.

Respondent attempts to harmonize the Fourth Circuit's opinion below with seven circuit court decisions. A careful examination of those cases reveals, however, that Respondent has misstated the holdings of those cases or has cited portions of the opinions that have no bearing on the issues presently before the Court.

Respondent cites two cases for the alleged proposition that the *Kolstad* good-faith standard is a matter of law to be decided by the courts. The Respondent's brief contains the following parenthetical for the holding of the Second Circuit Court of Appeals in *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376 (2d Cir. 2001): "*Kolstad* good faith defenses discussed in terms of 'as a matter of law.'" (Br. of Resp., at 7). Respondent has flatly misrepresented the Second Circuit's use of the phrase "as a matter of law." In fact, the

*Zimmermann* court plainly stated that the good-faith defense could *not* be decided as a matter of law. The actual holding of *Zimmermann* is as follows:

> In this case, the defense *cannot be said to have been established as a matter of law*. . . . Although [the] testimony suffices to permit a finding of [the supervisor's] awareness of federal law requirements, as the Plaintiff contends, and would be somewhat probative of an antidiscrimination policy, it does *not establish as a matter of law* the existence of such a policy, much less good faith enforcement of such a policy. At most, the evidence would have provided some basis for the jury to infer the existence of a policy and its good faith enforcement.

*Id.* at 385-86 (emphasis added) (citations omitted).

Similarly, Respondent summarizes the holding of *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000), with the following parenthetical: "discusses company's efforts 'as a matter of law' applying the *Kolstad* standards." (Br. of Resp., at 7). What the Eighth Circuit actually stated in *Ogden* is directly contrary to Respondent's implication:

> Concerning its purported "good-faith efforts to comply with Title VII," [defendant] points to its written sexual harassment policy, and a policy of encouraging employees with grievances to contact the home office. *"Plainly, such evidence does not suffice, as a matter of law," to establish "good-faith efforts"* in the face of substantial evidence that the company "minimized" [plaintiff's] complaints; performed a cursory investigation which focused upon [plaintiff's] performance, rather than [the harasser's] conduct;

> and forced [plaintiff] to resign while imposing no discipline upon [the harasser] for his behavior.

214 F.3d at 1010 (emphasis added). Both *Zimmermann* and *Ogden* demonstrate that the defense of good-faith efforts to comply with Title VII is generally a question of fact for the jury, not a matter of law for the court.

Next, Respondent contends that the Fourth Circuit's opinion is a proper application of *de novo* review of the jury's findings with regard to punitive damages. *De novo* legal review does not give an appellate court plenary authority to review the factual findings of the jury. Rather, under *de novo* review, the appellate court makes its own determination of the applicable *legal* standards, without regard to the lower court's ruling. The appellate court is still constrained by the Re-examination Clause of the Seventh Amendment not to disturb the factual findings of the jury if there is sufficient evidence in the record to support them. *See* U.S. Const., amend. VII ("[N]o fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."). The *de novo* standard requires the court first to take all facts and inferences in the light most favorable to the non-moving party and then to inquire whether the plaintiff would be entitled to the relief sought if a reasonable jury's assessment of the facts similarly favored the plaintiff. Only where the material facts are uncontroverted or where the plaintiff's best effort still falls short of the mark — those rare, black-or-white issues — should the court rule as a matter of law; the remaining areas of grey, in whatever gradient, are the province of the jury entitled to Seventh Amendment protection.

The Fourth Circuit in this case ruled that the jury's rejection of the good-faith defense and consequent award of punitive damages is not a factual finding and, therefore, is not entitled to any deference. (App. A, at 18a). The court's ruling was clearly not a proper application of *de novo* review.

Respondent's citation to *Hall v. Consolidated Freightways Corp.*, 337 F.3d 669 (6th Cir. 2003), is especially puzzling. According to Respondent, it cited *Hall* because the Sixth Circuit "addresses whether issue of punitive damages was properly submitted to the jury, not the appellate court's review of the trial judge's *de novo* review of the punitive damages issue." (Br. of Resp., at 7). Petitioner agrees that the proper issue before the Fourth Circuit below should have been whether the issue of punitive damages was properly submitted to the jury. The *Hall* court's discussion in this regard is particularly revealing:

> [T]he district court was correct in asserting that the decision to award punitive damages came down to the credibility of witnesses. Inasmuch as neither the district court nor this Court is permitted to make credibility determinations or to weigh the evidence on a Rule 50 motion, the jury's decision to credit the testimony of Plaintiff's witnesses over that of Defendant's witnesses cannot be disturbed.

*Id.* at 674. The *Hall* court concluded that "the record is replete with testimony refuting Defendant's alleged 'good faith' efforts." *Id.* at 675. Respondent's suggestion that the Fourth Circuit's decision below is consistent with *Hall* is patently wrong.

Respondent also suggests that the Fourth Circuit's decision below is consistent with the Seventh Circuit's recent case of *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478 (7th Cir. 2003). Respondent contends that the *Lampley* decision contains "no discussion of an Appeal court's review of a trial court's *de novo* review of punitive damages." (Br. of Resp., at 7). Once again, Respondent's parenthetical summary of the case has little resemblance to the actual holding of the court. The relevant portion of the *Lampley* decision provides as follows:

> [Defendant] asserts that there was insufficient evidence to warrant the imposition of punitive damages. The question of whether [the defendant] is entitled to judgment as a matter of law on this

> issue is subject to *de novo* review, with the evidence and all reasonable inferences taken in the light most favorable to [the plaintiff]. More specifically, we ask "whether no rational jury could have found for the plaintiff."

340 F.3d at 482 (quoting *Mathur v. Board of Trustees of S. Ill. Univ.*, 207 F.3d 938, 941 (7th Cir. 2000)). The *Lampley* court concluded, "Here, there was sufficient evidence for a jury to believe that [the defendant] failed to engage in good faith efforts at Title VII compliance." *Id.* at 483. Obviously, the Fourth Circuit here did not employ the same respect for jury findings as did the Seventh Circuit in *Lampley*.

Finally, Respondent makes the same analytical mistake that ensnared the Fourth Circuit below — confusing the standard for reviewing of the *amount* of the punitive damages verdict with the standard for reviewing the jury's underlying determination of *liability* for punitive damages. Respondent asserts that the Fourth Circuit's decision is consistent with *Romano v. U-Haul Int'l*, 233 F.3d 655 (1st Cir. 2000), and *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001). Although both *Romano* and *Swinton* contain separate discussions regarding whether the punitive damage awards at issue were excessive, *see Romano*, 233 F.3d at 672-74, and *Swinton*, 270 F.3d at 817-20, both cases also contain a thorough discussion of the issue presented here: namely, the jury's rejection of the *Kolstad* good-faith defense. *Romano*, 233 F.3d at 670 ("[B]ased on the evidence that was presented to the jury, construed most favorably for the [plaintiff], we find the jury's conclusion in this regard [(rejecting the good-faith defense under *Kolstad*)] was reasonable, and we will not disturb the verdict [for punitive damages]."); *Swinton*, 270 F.3d at 810-11:

> [I]t is well established that it is insufficient for an employer simply to have in place anti-harassment policies; it must also implement them. . . . Surely,

> [the defendant] cannot claim to have *implemented* its anti-harassment policy in good faith (even if it were conceived in good faith) when the very employee . . . charged with carrying it out . . . laughed along with the "nigger" jokes, did nothing to stop them, and never reported the repeated incidents to higher management.

(quotations omitted). Clearly, appellate review of liability for punitive damages is very different than appellate review of the amount of the punitive damages award. The Fourth Circuit's review of the *Kolstad* defense in the instant case was markedly different than that of the First Circuit in *Romano* and the Ninth Circuit in *Swinton*.

An accurate account of the authorities cited in Respondent's brief reveals the Fourth Circuit's divergence from the other circuits in terms of the appellate court's respect for the jury findings behind an award of punitive damages in employment discrimination cases. This Court should grant certiorari to bring the Fourth Circuit into conformity with the other circuits on this important issue.

**II. Petitioner Properly Preserved Her Arguments That The *Kolstad* Good-Faith Defense To Punitive Damages Does Not Apply Where The Person Who Discriminated Against The Plaintiff Is The Same Person Responsible For Ensuring The Employer's Compliance With Title VII And Where The Discriminator Is Sufficiently Senior To Be A Proxy For The Employer.**

Respondent's second line of attack is to argue that Petitioner failed to raise the "alter ego" theory below and, therefore, is barred from raising it on appeal to this Court. Once again, Respondent's arguments are inaccurate and unavailing. The record clearly reveals that Petitioner preserved these issues for appeal by raising them below, both at trial and on appeal to the Fourth Circuit. Although the

phrase "alter ego" was not actually used, the concept has been in this case since the Defendant's motions for judgment as a matter of law.

Petitioner clearly raised these issues in response to Respondent's motion for JMOL with respect to punitive damages.[1] In denying Respondent's motion for JMOL, the district court thoroughly discussed the actions of Respondent's upper management and their role in the discrimination and retaliation, which justified the award of punitive damages.[2] Furthermore, Petitioner clearly mentioned

1. Petitioner's brief contains the following argument:

> Although Defendant may have had a written policy against discrimination, there was ample evidence that such a policy was never enforced. In fact, the employee who presumably would have been in charge of enforcing the policy, *viz.* the hospital's human resources director, Richard Lowe, was a principal actor in the unlawful conduct that was the subject of Ms. Bryant's lawsuit. Ms. Bryant also testified that when she complained to the chief nursing executive about remaining in central services after becoming a licensed RN, the response was 'I don't see what your problem is.'

(Pl.'s Memo. in Opp. to Def.'s Mot. for JMOL, at 10-11).

2. The district court stated,

> The evidence is, however, more than sufficient to support the conclusion that any written policy was not implemented in good faith and that the discriminatory and retaliatory actions directed towards Plaintiff were sufficiently widespread among multiple persons with managerial and administrative responsibilities to treat those acts as the intentional actions of the employer.

(App. B, at 29a). The district court specifically discussed the actions of the human resources manager,

> Richard Lowe, the person who was responsible for enforcement of the policy during the relevant period.

(Cont'd)

the involvement of these upper-level managers in defending the punitive damages award on appeal to the Fourth Circuit, both in her initial brief,[3] and in her petition for rehearing.[4]

These issues are properly before the Court, and the Fourth Circuit's decision squarely conflicts with the decisions of other circuits, as previously set forth in the Petition for Certiorari.

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(Cont'd)

> As discussed below, the direct actions of Lowe himself, as reported by Plaintiff, could be interpreted as showing reckless indifference or actual malice, including evidence sufficient to support the conclusion that Lowe was involved in a concerted effort to deny Plaintiff any advancement opportunities and to encourage her to leave Defendant's employ.

*Id.* at 30a. The district court also discussed the actions of the Chief Nursing Executive, Mary Ann Angle. *Id.* at 31a.

3. In her initial brief to the Fourth Circuit, Petitioner used the verbatim quote from her brief to the district court, which is set forth *supra* in footnote 1. (Initial Br. of Appellee, at 36). Petitioner concluded, "The actions of these high-ranking employees is sufficient to impute to Defendant liability for punitive damages." *Id.*

4. Petitioner stated, "the individuals who carried out the illegal discrimination and retaliation were among the highest levels of management at the hospital: the director of human resources, the chief nursing executive, and the director of surgical services." (Pet. for Reh'g, at 6). Furthermore, Petitioner argued, "Although Plaintiff did not contest the *existence* of a written anti-discrimination policy, she vigorously disputed whether the policy was ever *enforced* by the hospital. In fact, the very people who should have enforced the policy are the subjects of Ms. Bryant's claims of discrimination and retaliation." (Pet. for Reh'g, at 6).

## III. There Is A Split In The Circuits Regarding Whether Tax Enhancement Damages Are Appropriate In Employment Discrimination Cases.

Finally, with respect to the tax enhancement remedy requested by Petitioner, two circuit courts of appeals have expressly permitted tax-based adjustments to back-pay awards in employment discrimination cases. In *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987), the court of appeals did not rule that such damages were inappropriate, as suggested by Respondent. In fact, the appellee in *Gelof* conceded that such damages were proper under Title VII. The court of appeals merely vacated the tax enhancement remedy because the district court based the calculation on a back pay award that was eventually reduced on appeal. *Id.* at 455-56. The *Gelof* court remanded the case to the district court to re-calculate the tax enhancement award using the correct back pay figure. *Id.* at 456.

The Tenth Circuit also approved of such relief in *Sears v. Atchison, Topeka & Santa Fe Ry.*, 749 F.2d 1451 (10th Cir. 1984). The *Sears* court's dicta that such relief may not be appropriate in the typical Title VII case, *id.* at 1456, is no longer valid because the income-averaging provisions of the Internal Revenue Code have been repealed.

Petitioner timely raised this issue during trial, after the jury's verdict, during the district court's independent consideration of the back-pay award. The district court specifically invited the parties to brief this issue in greater detail, along with the punitive damages question, prior to the entry of judgment in the case. The affidavit Petitioner submitted in support of the request was not in the nature of expert testimony relating to contested opinions; rather, Petitioner's tax attorney merely applied the statutory income-tax rates to Petitioner's income, which was already in the record in connection with her damages testimony.

There is a growing trend among lower federal courts to recognize the tax-enhancement remedy as a legitimate and necessary part of Title VII's make-whole purposes. Lower courts need guidance from this Court on this important issue.

## CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the initial Petition for Certiorari, Petitioner respectfully prays that the Court grant a writ of certiorari on all three questions presented.

Respectfully submitted,

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